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No. 05-1018

In The

Supreme Court of the United States

JOGA SINGH JOHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit United States Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Title 21 U.S.C. § 841(c)(2) makes it a felony to sell over-the-counter cold tablets containing pseudoephedrine if the defendant has knowledge or "reasonable cause to believe" that the pseudoephedrine will be "used to manufacture a controlled substance. . . ." The Ninth Circuit upheld a conviction in which jury instructions defined "reasonable cause to believe" as what a "reasonable person" would believe.

a. The Ninth Circuit construed § 841(c)(2) as permissibly establishing an objective intent standard for this serious felony. Does this conflict directly with decisions of the Tenth Circuit, summarized most recently in *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005), holding that § 841(c)(2) must be construed as establishing a subjective intent standard?

b. The Ninth Circuit also ruled that the "reasonable person" instructions raised no constitutional or interpretive issues concerning the *mens rea* for this serious felony, because that language actually conveyed a subjective intent standard. Does this decision conflict in principle with decisions of this Court and the sister circuits, interpreting "reasonable cause to believe" and "reasonable person" language as creating an objective intent standard in all other areas of the law?

2. Does the Ninth Circuit's decision conflict in principle with decisions of this Court holding that comparable language should not be construed to create a disfavored strict liability felony?

QUESTIONS PRESENTED – Continued

3. Section 841(c)(2) makes it a crime to sell pseudoephedrine when there is reasonable cause to believe it "*will* be used to manufacture a controlled substance." Here, it was undisputed that the cold pills were sold to DEA agents or informants and, hence, "will" *not* be so used. Does the Ninth Circuit's affirmance conflict with holdings of the Fifth and Seventh Circuits construing gun control statutes with similar language, and does it conflict with decisions of this Court holding that statutory language should not be ignored or treated as superfluous?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joga Singh Johal petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals (App. 1-14), which became final on November 9, 2005.

OPINIONS BELOW

Mr. Johal was convicted of two counts of violating 21 U.S.C. § 841(c)(2) for distribution of pseudoepehedrine while having "reasonable cause to believe" that it would be used to manufacture a controlled substance (methamphetamine) – once on March 7, 2002 and once on March 13, 2002. He was also convicted of one count of unlawful possession of pseudoephedrine, on August 13, 2002, in violation of that same statute, using that same "reasonable cause to believe" standard.

The defendants filed written motions arguing that § 841(c)(2) appeared to lack a subjective *mens rea* requirement and, if it was so interpreted, then it was unconstitutional. Alternatively, the defendants sought jury instructions defining "reasonable cause to believe" as a subjective intent standard. The district court denied the motions. App. 51-56; App. 57-59.

Judgment was entered on December 18, 2003. App. 41-50. An Amended Judgment was entered on January 14, 2004. App. 31-40. The Notice of Appeal was filed on December 18, 2003.

The Ninth Circuit affirmed in an Opinion dated August 30, 2005. App. 16-29. The decision became final

when, following appellee's motion to modify, an Order and Amended Opinion was filed on November 9, 2005. *United States v. Johal*, 421 F.3d 955 (9th Cir. 2005), App. 1-14.

JURISDICTION

The decision of the Ninth Circuit U.S. Court of Appeals became final on November 9, 2005. App. 1-14. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 21 U.S.C. § 841(c), "Offenses involving listed chemicals," provides:

> Any person who knowingly or intentionally –
>
> (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;
>
> (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
>
> (3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

> shall be fined in accordance with Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. The Charges

Mr. Johal was charged on August 6, 2002, with one count of violating 21 U.S.C. § 841(c)(2). The indictment alleged that on March 13, 2002, in Spokane, Washington, he distributed 6,912 pills, each containing 30 mg. of pseudeoephedrine, "knowing or having reasonable cause to believe" that they "would be used to manufacture

methamphetamine." Mr. Johal owns a convenience store, and the charges concerned sales made in the course of business.

A superseding indictment kept that March 13 charge as Count 2 and added a Count 1, alleging distribution of 2,928 pills on March 7, 2002, in violation of the same statute. A new Count 3 charged unlawful possession under that statute on August 13, 2002, using the same "reasonable cause to believe" standard. Count 4 alleged forfeiture.

B. Pre-Trial Motions

A number of defendants – storeowners, employees and distributors of the cold pills – were charged in this indictment. Some were tried separately, some dismissed, and others acquitted. Mr. Johal was eventually tried alone.

Two key aspects of the pre-trial motions practice are important. The first is that the district court ruled that a motion or objection made on behalf of one defendant would be considered made on behalf of all. The second is that several defendants challenged the constitutionality of § 841(c)(2)'s "reasonable cause to believe" standard for lack of a *mens rea* requirement and alternatively sought jury instructions defining reasonable cause as actual belief. The district court denied all of these motions. App. 51-56; App. 57-59.

C. The First, Hung, Jury

Mr. Johal was originally tried with one other codefendant. A jury question shows that intent was the key disputed issue. After asking to listen to tape recordings of sales, the jury asked: "Can you clarify Instruction 25

which talks to indirect evidence and Instruction 16 on 'reasonable cause to believe'? not amounting to direct knowledge." The jury was then unable to agree, and a mistrial was declared.

D. The Second Trial

Mr. Johal was retried alone. This time, the jury convicted on all counts.

II. THE SECOND TRIAL

A. The Parties' Theories

The government's theory at the second trial was the same as its theory at the first trial: that Mr. Johal should have known that the cold pills would be used to facilitate methamphetamine sales, even if he did not actually know.

In opening, for example, the government argued that it would prove: "almost three cases of pseudoephedrine were found and that Joga Johal possessed those boxes of pseudoephedrine . . . with the knowledge or *at the very least, reasonable cause to believe* that that pseudoephedrine would be used to manufacture methamphetamine."

The defense opening showed that denial of *mens rea* was their key issue:

> How can they do that [prove what "the pills are going to be used for"]? They're going to say amounts. . . .
>
> Well, you can suspect it's not for a cold, you could suspect that they were going to redistribute the pills. If that's the case, if they're redistributing the pills, they're not making meth with them.

The defense stressed Mr. Johal's lack of *mens rea* throughout, explaining, for example, Mr. Johal's immigrant status, limited English ability, and lack of familiarity with words associated with "meth" or "meth cooks."

B. The Government's Case

1. March 7, 2002

DEA Agent McNall explained how they came to use informant and methamphetamine abuser Pascale Hostetler to make a March 7, 2002, purchase from Mr. Singh's store, J&K. She was sent in with money and a recording and transmitting device. Agent McNall worked with her undercover that night, dressed in jeans, t-shirt, boots, and long hair. McNall described several trips that she made in and out, some with him, each time purchasing boxes of Action brand cold pills.

On one of the trips, McNall claimed that Mr. Johal told him that he was nervous, but invited him to come back later to sell him a whole case. Agent McNall returned at 11 p.m. He was unable to buy the case, though; they were only able to buy 40 boxes. Mr. Johal came "out of the store, the front door of the store, walked over towards my vehicle with Miss Hostetler, was looking around. Looking for police cars, looking for anything out of the ordinary, basically doing surveillance of the store lot and the street."

On cross-examination, Agent McNall admitted that it was he who used the slang words for the drug trade – Mr. Johal never said meth, or crystal, or cook. In fact, he acknowledged that Mr. Johal did not speak English well and many times just said, "I don't know."

Informant Pascale Hostetler then testified. After acknowledging her own addiction to methamphetamine, including her use even while acting as an informant; her knowledge of the intricacies of methamphetamine production; how much money (over $10,000) she earned from informing; and how she stole $2,200 that DEA gave her designated for in-patient treatment, she testified about the controlled purchase she made on March 7, 2002. She confirmed most of Agent McNall's testimony about going in several times in the early evening to purchase Action, and returning to buy more later.

She attempted to imply that Mr. Johal knew what she was buying the pills for. She said to Mr. Johal, "'You know what I do.'" She also acknowledged, however: "He said, 'I don't know what you do, you know.'" She stated that Mr. Johal made reference to a letter, "Saying that they're only allowed to sell you three boxes in a 24 hour period." She then told him that she was a cook and "all the cooks were in jail." His response was, "'Yeah, I know, to buy your stuff.'"

She admitted that her drug use hurt her memory, though, and made it hard for her to remember facts. She acknowledged that her testimony was replete with specifics about what Mr. Johal told her, even things that could not be heard on the tapes, but that she could not remember specifics about her conversation that night with Agent McNall.

Finally, when asked what the pills purchased during her controlled buy were going to be used for, she stated they were *never* going to be used to make methamphetamine.

2. March 13, 2002

DEA Agent Taylor then testified that on March 13, 2002, they orchestrated another controlled buy at J&K, using another informant. Coincidentally, while waiting to begin this buy, he saw a different customer walk into the store and then leave with a large beer case that seemed too light to hold beer. They stopped him and discovered 83 boxes of Action pills in that beer box. Mr. Green was the driver and Mr. Henjum was the purchaser.

The controlled purchase that occurred at J&K on March 13, however, was accomplished by an informant: Dan Wooten. According to Agent Zidack, Wooten received from the DEA $120 plus "considerations for potential pending charges as a result of the vehicle stop." Wooten was given $1,600 to make the purchase and ended up with one case of Action, 144 boxes.

Zidack never testified that Mr. Johal knew anything about Mr. Wooten's use of Action pills to cook methamphetamine. He acknowledged that Johal was from India and that his primary language was Punjabi. He acknowledged that he did not know how inventory was kept at Mr. Johal's store, or who ordered the Action. And he confirmed that when Hostetler bought the pills on March 7, "It wasn't my intention to manufacture those into methamphetamine." Even the pills that he seized from Wooten were not used to manufacture methamphetamine – Zidack seized them, instead. "Yes, they could have been, but they were not."

3. August 13, 2002

Agent Cummings described the search warrant that he helped execute at the J&K Grocery on August 13, 2002. The boxes of Action found at the store on that date formed the basis for Count 3, possession.

C. The Defense Case

The defense case consisted of friends, community members, a community college English as a second language teacher, a manager of a large grocery store chain, and Mr. Johal himself, all explaining Mr. Johal's immigrant status, his central role in the Sikh community, and his continued dependence upon other members of that community in business and family affairs. This evidence showed that his knowledge of English is extremely limited (though sufficient in context for his business), that he cannot read or write English at all, that he has no knowledge of American slang or of the workings of the American drug culture, that he had a reputation for honesty, and that he sells Action from the back room for the same reason that the large chain stores do: it is constantly stolen from the shelves.

D. Sentencing

The defense argued for a two-level reduction in offense level due to acceptance of responsibility, since Mr. Johal denied neither *mens rea* or *actus reus*. The district court rejected this argument, saying that admitting the acts but denying intent precludes acceptance of responsibility.

The district court concluded that the Guidelines range was 151 to 188 months, but granted the motion for downward departure:

> Now, while technically aberrant behavior is not applicable, it certainly strikes me as this conduct that is the basis of the conviction is aberrant. It's totally out of character for Mr. Johal. It is inconsistent with his prior conduct and his activities as a law abiding, responsible, and honorable citizen, you know, member of our community.
>
> The Court – it is my determination that the combination of factors of extraordinary family circumstances, disparity of resolution, aberrant behavior, all form a basis for downward departure. And I downward depart from level 34 to level 27.

He imposed sentences of 70 months, concurrent, and ordered Mr. Johal released pending appeal:

> . . . there are such extraordinary circumstances, given the issues of law and the circumstances surrounding the defendant, as I have indicated, that Mr. Johal will be allowed to remain on released from custody on the same conditions of release that have been previously established.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ESSENTIALLY ADOPTED AN OBJECTIVE INTENT STANDARD FOR § 841(c)(2). THIS CONFLICTS WITH THE TENTH CIRCUIT'S DECISION THAT § 841(c)(2) MUST BE CONSTRUED AS ADOPTING A SUBJECTIVE INTENT STANDARD, INSTEAD.

Section 841(c)(2) provides:

> Any person who *knowingly or intentionally* –
>
> * * *
>
> (2) possesses or distributes a listed chemical *knowing, or having reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter . . .
>
> shall be fined . . . or imprisoned not more than 20 years . . . or both.

(Emphasis added).

It is a serious felony and, as the initial emphasized material shows, it begins with a *mens rea* of "knowingly or intentionally." The latter emphasized material, however, contains an alternative *mens rea*: "knowing or having reasonable cause to believe."

The instructions on the elements all used this alternative "reasonable cause to believe" language. Instruction 6; App. 60-61 (elements of Count 1); Instructions 7-8; App. 61-62 (elements of Counts 2-3). The Verdict Form also used the "or having reasonable cause to believe" language.

Instruction No. 12, defining "reasonable cause to believe," exacerbated the problem by defining this as a "reasonable person" standard:

> "Reasonable cause to believe" means to have knowledge of facts which, although *not amounting to direct knowledge, would cause a reasonable person knowing the same facts,* to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance.

App. 62 (emphasis added).

The Ninth Circuit affirmed use of the objective "reasonable person" standard to define the "reasonable cause to believe" prong of § 841(c)(2). *United States v. Johal*, 421 F.3d 955, 959, App. 7.

The Ninth Circuit's decision on this point conflicts with the conclusion reached by the Tenth Circuit, as explained most recently in *United States v. Truong*, 425 F.3d 1282, 1289. That court began by explaining that two other circuits, the Ninth Circuit included, had essentially construed § 841(c)(2)'s "reasonable cause to believe" language as creating an objective intent standard: "Two circuits have so held." *Truong*, 425 F.3d at 1289 (citing *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) and *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 497 (2005), as courts reading § 841(c)(2) to permit conviction based on a purely objective standard, given its "reasonable cause to believe" language).

The Tenth Circuit continued that it had adopted a different interpretation: "But this Circuit has interpreted the 'reasonable cause to believe' standard of 21 U.S.C. §§ 841(c)(2) and § 843(6) as 'akin to actual knowledge.'"

Truong, 425 F.3d 1282, 1289. *Accord United States v. Buonocore*, 416 F.3d 1124, 1133 (10th Cir. 2005) (upholding a § 841(c)(2) conviction because jury instructions explained the reasonable cause to believe inquiry as "entirely subjective, the inquiry is not to be viewed from the perspective of a hypothetical reasonable person"); *United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000).

The Tenth Circuit further acknowledged the Circuit split on this issue by continuing, "The Eighth Circuit has criticized our interpretation on the ground that it 'would effectively equate reasonable cause to believe with actual knowledge and thereby render the "reasonable cause to believe" phrase redundant.'" *Truong*, 425 F.3d at 1289, n.3 (citing *Galvan*, 407 F.3d at 957).

The Ninth Circuit's decision does have some support in other circuits. *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir.); *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir.), *cert. denied*, 531 U.S. 879 (2000) (no plain error to instruct jury: "The question is what would a reasonable person reasonably have believed based on the evidence known to the defendant.").

But it is not supported by the Tenth Circuit decision upon which the panel relied, *United States v. Saffo*, 227 F.3d 1260. As discussed above, the Tenth Circuit itself acknowledges that the Ninth Circuit's standard is an objective one and that it conflicts with the subjective one adopted by the Tenth Circuit.

This distinction is borne out by the analysis in *Saffo*; the court in that case read § 841(c)(2)'s "reasonable cause to believe" standard as a subjective one, focusing on the particular defendant's own knowledge of certain suspicious facts that gave him cause to believe something was amiss.

For example, it said, "'The obvious delimiting words in the statute are those requiring "intent or reason to believe . . . . " This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.'" *Saffo*, 227 F.3d 1260, 1268 (citation omitted). It continued that "reasonable cause to believe" is "akin to actual knowledge," *id.*, and that "reasonable cause to believe" "comports with the subjective 'guilty mind' or 'guilty knowledge' requirement." *Id.* The Tenth Circuit then upheld § 841(c)(2)'s "reasonable cause to believe" standard because it was so "subjective," so "akin to actual knowledge," and so focused on individual criminal intent or "bad faith."

The *Saffo* court never discussed what the jury instructions in that case said. The problem in this case is that instructions told the jury to use the "reasonable person" standard to decide whether Mr. Johal had "reasonable cause to believe" the prohibited act would occur. The Tenth Circuit's decision does not endorse that approach – its reasoning contradicts that approach.

Tenth Circuit decisions following *Saffo* make this difference between subjective and objective instructions clear – by upholding § 841(c)(2) convictions only where the "reasonable cause to believe" language is clearly defined for the jury as a subjective intent standard. *E.g.*, *United States v. Buonocore*, 416 F.3d 1124, 1133.

The Ninth Circuit's decision – allowing a conviction despite the absence of any language conveying a subjective intent standard to the jury – thus conflicts directly with the Tenth Circuit's decisions to the contrary.

II. THE NINTH CIRCUIT'S DECISION TO CALL "REASONABLE CAUSE TO BELIEVE" BY A "REASONABLE PERSON" A SUBJECTIVE INTENT STANDARD (THUS SAVING § 841(c)(2) FROM CONSTITUTIONAL DEFICIENCY) CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUITS HOLDING THAT SUCH LANGUAGE CREATES AN OBJECTIVE INTENT STANDARD

The Ninth Circuit also characterized the statute and instructions used in Mr. Johal's case as creating a subjective intent standard: "we hold that 'reasonable cause to believe,' in the context of § 841(c)(2), requires that a defendant subjectively know facts that either cause him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs." *United States v. Johal*, 421 F.3d 955, 959. App. 7. It concluded that this was sufficiently subjective to avoid any constitutional or interpretive question about whether this felony eliminated scienter. *Id.*

The decision to characterize "reasonable cause to believe" based on a "reasonable person" standard as subjective conflicts with decisions of this Court and of the sister circuits which consistently hold, in all other contexts, that "reasonable cause to believe" and "reasonable person" language create an objective intent standard.

This Court has ruled that "reasonable person" language creates an objective standard.[1] The circuit courts

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[1] *E.g.*, *Crawford-El v. Britton*, 523 U.S. 574 (1998) (characterizing "reasonable person" standard for determining immunity from liability in civil rights context as objective rather than subjective standard); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (reformulating qualified

(Continued on following page)

have held that such "reasonable person" language creates an objective intent standard.[2] The circuit courts have come to the same conclusion about the "reasonable cause to believe" language, that is, they consistently hold that the "reasonable cause to believe" standard is an objective one.[3]

In fact, when criminal liability is determined on an objective basis rather than a subjective one, the statute is said to establish strict liability. *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) (criminal offenses which dispense with traditional "*mens rea* requirement or 'mental element'" are generally described "as strict liability crimes"; Court retains the verbiage though stating it may be misnomer in some respects).

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immunity doctrine by replacing common law subjective standard with objective standard allowing liability only where official violates "clearly established statutory or constitutional rights of which a reasonable person would have known.").

[2] *E.g.*, *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 786 (6th Cir. 2002) (in labor law context, characterizing "reasonable person" standard as objective one); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1074-75 & n.7 (9th Cir. 2002) (*en banc*), *cert. denied*, 539 U.S. 958 (2003) ("reasonable person" standard is an objective standard, not subjective one; stated in context of determining whether a "reasonable person" would take something as threat); *In re Su*, 290 F.3d 1140, 1145 (9th Cir. 2002) (in bankruptcy, "reasonable person" standard is objective one).

[3] *E.g.*, *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 578 (1st Cir. 1980) (in bankruptcy context, "reasonable cause to believe" standard is objective one); *United States v. Kraase*, 484 F.2d 549, 551 (7th Cir. 1973) (in gun control statute, "reasonable cause to believe" in law prohibiting sale to out-of-state resident, "serves to lighten the Government's burden of proving subjective intent"); *Kravetz v. Joange Bldg. Corp.*, 341 F.2d 561, 563 (2d Cir. 1965) (in bankruptcy, "test is not the subjective one of what Berfond believed but the objective one of what he had reasonable cause to believe.").

Thus, the Ninth Circuit's decision that "reasonable person" and "reasonable cause to believe" convey a subjective standard to the jury conflicts with decisions of this Court and the lower court to the contrary.

III. THE NINTH CIRCUIT'S DECISION UPHOLDING § 841(c)(2) CONVICTIONS BASED ON THE "REASONABLE CAUSE TO BELIEVE" AND "REASONABLE PERSON" STANDARD CONFLICTS WITH THE HOLDINGS OF *STAPLES*,[4] *X-CITEMENT VIDEO*,[5] *LIPAROTA*,[6] AND *MORISSETTE*[7] THAT CRIMES LACKING SCIENTER ARE DISFAVORED

A. This Court Has Consistently Held that Crimes Lacking Scienter are Disfavored

This Court has consistently held that crimes lacking scienter requirements are disfavored. "In our jurisprudence guilt is personal." *Scales v. United States*, 367 U.S. 203, 224-25 (1961). "The existence of a *mens rea* is the rule of, rather than the exception to, principles of Anglo-American jurisprudence." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (citation omitted). As explained in *Morissette v. United States*, 342 U.S. 246, 250-01 (1952), "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human

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[4] *Staples v. United States*, 511 U.S. 600 (1991).

[5] *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

[6] *Liparota v. United States*, 471 U.S. 419 (1985).

[7] *Morissette v. United States*, 342 U.S. 246 (1952).

will and a consequent ability and duty of the normal individual to choose between good and evil."

As a result, this Court must "construe [a criminal] statute in light of the fundamental principle that a person is not criminally responsible unless an evil-meaning mind accompanies an evil doing hand." *Morissette*, 342 U.S. at 251.

B. The Only Exception is for Public Welfare Offenses, That is, Crimes Penalizing Acts that are Inherently Dangerous

The only exception to the rule requiring scienter is for "public welfare offenses," that is, statutes whose purpose is "the regulation of 'industries, trades, properties or activities that affect public health, safety or welfare.'" *Morissette*, 342 U.S. at 254.

Such statutes regulate inherently dangerous activities, that is, activities where the "dangerousness [of the conduct] alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*." *Staples*, 511 U.S. at 611. The corollary is that where the criminal act or omission is not inherently dangerous, it does not necessarily put the actor on such notice, and hence it cannot be criminalized without personal *mens rea*.

C. Selling Over-the-Counter Cold Remedies Does Not Fall into this Narrow Category of Inherently Dangerous Activities

Dangerous explosives, hazardous wastes, and explosive liquids fall within the public welfare offense exception;

anti-trust activities and failing to register as a felon when not knowing of the registration requirement, do not.[8]

It is true that drugs (and similar products that are usually benign) have sometimes fit into this exception for public welfare offenses. In the controlling cases upholding criminalization of acts concerning drugs without proof of *mens rea*, however, the drugs were either so inherently dangerous that they required prescriptions (like opium), or the crime resulted in only lesser, misdemeanor, sanctions. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (upholding strict criminal liability under Food and Drug Act regulations designed "to keep impure and adulterated food and drugs out of the channels of commerce," in part because crime was just a misdemeanor); *United States v. Balint*, 258 U.S. 250, 252 (1922) (upholding indictment for strict liability crime of selling narcotic opium derivative without required paperwork).

The same cannot be said of non-prescription, over-the-counter, cold remedies. They are inherently benign and helpful drugs, not dangerous ones; they are not otherwise federally regulated and do not require a prescription; and conviction does not result in mere misdemeanor penalties.

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[8] *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971) (constitutionality of absence of *mens rea* for each element of crime depends on dangerousness of the activity: "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (implying scienter requirement in criminal antitrust statute, though not in similar civil one); *Lambert v. California*, 355 U.S. 225, 228 (1957) (reversing conviction for failure to register as felon, because it lacked element of knowledge of registration requirement).

The final factor – the severity of this offense – is no small matter. As this Court noted in *Staples*, 511 U.S. at 616, "the potentially harsh penalty attached to violation of § 5861(d) – up to 10 years' imprisonment – confirms reading [specific intent into] the Act." *Id.* (quoting *Liparota*, 471 U.S. at 426). The maximum penalty in Mr. Johal's case was twenty years; his standard sentence range was 155 to 188 months. It does not fit into the public welfare offense exception for this reason, either.

D. This Court Must Construe § 841(c)(2) As Having a *Mens Rea* Requirement to Save it From Unconstitutionality

Since this is not a public welfare statute, the question is whether Congress eliminated scienter and thereby posed grave questions concerning the statute's constitutionality, or whether scienter should be implied. The Ninth Circuit claimed that Congress included a subjective intent element, but watered it down to an objective one by permitting it to be defined as what a "reasonable person" would have believed. We have discussed above why the Ninth Circuit's interpretation of this language as creating a subjective *mens rea* conflicts with the general rule that "reasonable person" is an objective standard.

But the purely objective intent standard that the Ninth Circuit really adopted for § 841(c)(2) is, at best, constitutionally suspect. This Court has continually held that felony statutes that dispense with *mens rea* – or that seem, on the most grammatical reading, to dispense with *mens rea* – are constitutionally suspect, and that every effort should be made to construe the more stringent *mens rea* requirement appearing in introductory portions of

such statutes as applying to the entire statute to avoid such constitutional problems.

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, for example, this Court was asked to determine the scope of a knowledge requirement in a statute prohibiting distribution of child pornography. That statute's structure parallels § 841(c)(2)'s language and structure – it contains a *mens rea* requirement in the introductory sentence, but arguably lacks *mens rea* in the subparagraph defining the particular crime charged:

> (a) Any person who –
>
> (1) *knowingly* transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –
>
> (A) the producing of such visual depiction involves the use of a *minor* engaging in sexually explicit conduct . . .
>
> (2) *knowingly* receives, or distributes, any visual depiction that has been transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported . . . if –
>
> (A) the producing of such visual depiction involves the use of a *minor* engaging in sexually explicit conduct . . .
>
> shall be punished . . .

18 U.S.C. § 2252 (emphasis added).

The question in *X-Citement Video* was whether the government had to prove that the defendant knew the

victim was a minor, or had to prove only knowledge of the shipment or receipt. *Id.*, 513 U.S. at 69-70.

This Court began by acknowledging, "The most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces." *X-Citement Video*, 513 U.S. at 68. The same might be said of "knowingly or intentionally" in the introductory language of § 841(c).

This Court rejected that "natural" reading for three reasons: "because of anomalies which result from this construction, and because of the respective presumptions that some form of scienter is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.*, 513 U.S. at 68-69. It decided that the statute required proof that the defendant knew the person depicted was a minor. *Id.*, 513 U.S. at 75.

The *X-Citement Video* Court cited with approval *Morissette v. United States*, 342 U.S. 246. The statute in *Morissette* stated: "Whoever embezzles, steals, purloins, or *knowingly converts* to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States . . . " commits a crime. 18 U.S.C. § 641 (emphasis added). The *Morissette* Court ruled that "knowingly" applied not just to exercise of dominion and control, the fact closest to the word "knowingly," but also to the fact that the property over which dominion was exercised belonged to the United States.

The conclusion in *Morissette* was not compelled by the statute's grammar. The word "knowingly" was placed in an

"isolated position," which suggested that it only attached to the verb 'converts,' and required only that the defendant intentionally assume dominion over the property." *X-Citement Video*, 513 U.S. at 70. Nevertheless, this Court "used the background presumption of evil intent to conclude that the term 'knowingly' also required that the defendant have knowledge of the facts that made the taking a conversion – *i.e.*, that the property belonged to the United States." *Id.*

This Court in *X-Citement Video* also relied upon *Liparota v. United States*, 471 U.S. 419. In *Liparota*, the statute provided: "whoever *knowingly* uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations" is guilty. 7 U.S.C. § 2024(b)(1). The question was whether "the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations." *Liparota*, 417 U.S. at 420-21.

The *Liparota* Court held that the "statute's use of 'knowingly' could be read only to modify 'uses, transfers, acquires, alters or possesses' or it could be read also to modify 'in any manner not authorized . . . '" *X-Citement Video*, 513 U.S. at 70 (quoting *Liparota*). Either interpretation was possible and the legislative history shed no light on which was intended. *Liparota*, 471 U.S. at 424-25. Nevertheless, this Court "held the scienter requirement applied to both elements by invoking the background principle set forth in *Morissette*." *X-Citement Video*, 513 U.S. 70 (describing *Liparota*).

More recent decisions have also applied a "knowledge" requirement to criminal statutes, even where the statute's

language did not require it, when the nature of the prohibition would not necessarily have put the ordinary person on notice that the activity was inherently dangerous or necessarily subject to regulation. In *Staples v. United States*, 511 U.S. 600, this Court construed 18 U.S.C. § 5861(a)(6), prohibiting possession of an unregistered firearm but containing no *mens rea*. This Court reversed the conviction because the government had not been required to prove that the defendant had "knowledge" that the item he possessed fit the statutory definition of "machinegun." The Court rejected the argument that the statute described a public welfare offense, and emphasized the harsh penalties resulting from a conviction. *Staples*, 511 U.S. at 616.

Since selling over-the-counter cold remedies is no more inherently dangerous than possessing machineguns or distributing videos, the Ninth Circuit's decision stands in conflict with the decisions in *Staples*, *X-Citement Video*, and the other cases cited in this section. It also stands in conflict with the rule that statutes are to be interpreted to avoid such constitutional questions. *Cheek v. United States*, 498 U.S. 192, 203 (1991).

IV. THESE § 841(c)(2) CRIMES REQUIRE PROOF THAT THE PSEUDOEPHEDRINE *"WILL BE* USED TO MANUFACTURE" METHAMPHETAMINE, BUT THE PROOF HERE SHOWED THAT IT *WILL NOT BE* SO USED BECAUSE IT WAS OBTAINED BY INFORMANTS. THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE FIFTH AND SEVENTH CIRCUITS CONCERNING STING OPERATIONS, AND WITH DECISIONS OF THIS COURT ON STATUTORY INTERPRETATION

Section 841(c)(2) includes the element that the precursor chemical that is sold "will be used to manufacture" a controlled substance. Where as here the plain language is unambiguous (and poses no constitutional questions), such plain language controls. Proof that the pseudoephedrine in the cold tablets "will be used to manufacture" methamphetamine is therefore necessary to convict.

The evidence, however, was undisputed that the cold tablets seized following the controlled buys was never destined to be used to manufacture a controlled substance – because it was seized following a sting operation.

It was in this context that the instructions explicitly relieved the jury of the duty to determine whether the pills "will be used to manufacture" methamphetamine. Instruction 9 stated in full: "The government does not have to prove that any pseudoephedrine actually was used to manufacture a controlled substance." App. 62.

The Ninth Circuit's decision that the statute's plain language permitted this interpretation and instruction stands in accord with decisions of two other circuits:

United States v. Green, 779 F.2d 1313 (7th Cir. 1985); *United States v. Prather*, 205 F.3d 1265.

But this decision – that proof of sales to informants or agents during a sting operation is sufficient to support a conviction under the statute that requires that the precursor chemical "will be used" to manufacture the prohibited drug – conflicts in principle with decisions of the Fifth and Seventh Circuits. In conflicts with *United States v. Kraase*, 484 F.2d 549, 551 (7th Cir. 1973), which reversed a conviction for violating 18 U.S.C. § 922(a), which bars licensees from selling certain guns knowing "or having reasonable cause to believe" that the sale is to an out-of-state resident, because the defendant could not be convicted of knowing or having reasonable cause to believe that he was transferring a firearm to an out-of-state resident when it was actually transferred to an in-state resident – an ATF agent who led the seller to believe he was an out-of-state resident. It also conflicts with *United States v. Plyman*, 551 F.2d 965, 967 (5th Cir. 1977), which came to the same conclusion as did *Kraase*.

The Ninth Circuit's decision does not only conflict in principle with these ATF sting operation cases. It also conflicts with decisions of this Court on statutory interpretation.

The Ninth Circuit's decision construes "will be" as "will not be" or "hopefully might be" or even as meaningless. This conflicts with the rule that where the plain language is unambiguous (and poses no constitutional questions), that plain language controls – and that this is especially so when the criminal statute at issue regulates an otherwise lawful activity (here, over-the-counter drug sales). *Ratzlaf v. United States*, 510 U.S. 135 (1994)

(construing criminal statute regulating otherwise lawful activity of conducting currency transactions). The Ninth Circuit's decision that the words "will be used to manufacture" can essentially be ignored also conflicts with the rule, "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). *See Ratzlaf v. United States*, 510 U.S. 135, 140-41.

Further, the rule of lenity requires that an ambiguous statute be given the more restrictive and less punitive reading. *Ratzlaf*, 510 U.S. at 148-49; *Williams v. United States*, 458 U.S. 279, 286 (1982). The Ninth Circuit's decision flouts this rule, also.

V. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR REVIEWING THESE ISSUES, BECAUSE *MENS REA* WAS THE KEY DISPUTED ELEMENT

The instructions in Mr. Johal's case eliminated scienter completely.

It is irrelevant that one portion of the challenged instruction contained an alternative knowledge element. The instruction permitted conviction if Mr. Johal knew that the cold tablets would be used to manufacture methamphetamine or if he did not know but a reasonable person would have known. The jury did not specify the theory upon which it relied – it returned a general verdict of guilty. If any of the legal bases for this verdict were impermissible, reversal is required. *Griffin v. United States*, 502 U.S. 46, 56-59 (1991).

Even if the error is reviewed for harmlessness, *Neder v. United States*, 527 U.S. 1 (1999), it was certainly harmful here. Intent was the only disputed element at either trial. When the first jury deliberated, it was the issue on which they asked a question and then hung. Intent was the key disputed element at the second trial, also, as the testimony of Mr. Johal and the ESL professor concerning his limited understanding of English, drugs and slang, and the testimony of the Safeway manager about his own lack of knowledge of a connection between cold pills and methamphetamine, confirm.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 3rd day of February, 2006.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOGA SINGH JOHAL, *Defendant-Appellant.*	No. 03-30579 D.C. No. CR-02-00214-FVS ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, Chief Judge, Presiding

Argued and Submitted
January 10, 2005 – Seattle, Washington

Filed August 30, 2005
Amended November 9, 2005

Before: Mary M. Schroeder, Chief Judge, Susan P. Graber and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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Russell E. Smoot, Assistant United States Attorney, Spokane, Washington, for the plaintiff-appellee.

Allen R. Bentley, Law Office of Allen R. Bentley, Seattle, Washington, for amicus curiae, National Association of Criminal Defense Lawyers.

ORDER

Appellee's motion to modify the court's decision, filed October 18, 2005, is **GRANTED.**

The opinion filed August 30, 2005, is amended in its entirety. The Clerk is instructed to file the amended opinion concurrently with this order.

No further petitions for panel rehearing or petitions for rehearing en banc will be considered by the court.

OPINION

FISHER, Circuit Judge:

Joga Singh Johal ("Johal") appeals his conviction for selling and possessing large quantities of over-the-counter cold pills containing the ingredient pseudoephedrine "knowing or having reasonable cause to believe" that they would be used to manufacture methamphetamine, an illegal substance under 21 U.S.C. § 841(c)(2). Johal argues that § 841(c)(2) impermissibly imposes criminal liability without a mens rea requirement and that it mandates that the illegal substance actually be produced, foreclosing his conviction under a sting operation. Johal also alleges that the jury instructions failed to ensure a unanimous verdict and that the district court should have found him eligible for a sentence reduction because of his acceptance of responsibility.

We reject Johal's contention that a "reasonable cause to believe" standard, as construed and applied here, permits a defendant to be convicted without a showing of any criminal intent. Instead, the standard incorporates both subjective and objective considerations to ensure the

defendant had a sufficiently "guilty mind" in violating the statute. We further hold that a conviction under the statute does not require that the illegal drug actually be manufactured. We also conclude that the trial court did not err in its jury instructions or in denying Johal a reduction for acceptance of responsibility.

I.

Johal is the owner of a grocery business in Spokane, Washington, called "J & K Gas & Grocery". He invested in the store in 1995, some 10 years after he emigrated to the United States.

Beginning in the winter of 2001, the Drug Enforcement Agency ("DEA") began surveilling Johal's grocery store and a number of other convenience stores in the area. The DEA suspected that grocery store owners were selling excessive quantities of pseudoephedrine to individuals, who then used the ingredient to make methamphetamine.

Pseudoephedrine is a chemical ingredient in a number of cold medicines that can be purchased over-the-counter without a prescription. However, pseudoephedrine, when extracted from cold pills and mixed with other chemicals, is also used to manufacture methamphetamine. Certain brands of pseudoephedrine pills, including Action brand, facilitate the process of extraction because they do not have a coating on them.

Johal carried Action brand pseudoephedrine. At some point, he stopped stocking Action cold pills on the shelves because he said people were stealing them, and instead

began keeping the medicine behind the counter and in the back room of the store.

The government indicted Johal based on a series of transactions in which he sold large amounts of Action cold pills to real or ostensible customers. On March 7, 2002, he sold 61 boxes of Action to P.H., who had agreed to participate in a DEA undercover sting operation against Johal's store in exchange for having criminal charges against her dropped. P.H. entered the store and bought three boxes while a DEA Task Force Officer ("DEA Officer") – working undercover – waited in a car outside the store. P.H. left the store and then re-entered with the DEA Officer. In the next half hour, the DEA Officer and P.H. each made multiple three-box purchases. The DEA Officer asked Johal if they could buy more. The DEA Officer testified that he told Johal he wanted a case of Action because he was a cook and wanted to make "crystal," a shorthand reference to crystal methamphetamine. Johal told the two to return to the store later that evening. They returned after the store closed, and Johal sold P.H. 40 more boxes of Action.

The second controlled purchase occurred on March 13, 2002, by DEA informant D.W. Just a week earlier, D.W. had purchased from Johal's store a case of matches, which have red phosphorous tips that also are used in methamphetamine production. After that transaction, DEA agents pulled D.W. over in his car and found methamphetamine and other ingredients used to make the drug. D.W. agreed to cooperate with the DEA, and the next week he purchased a case (144 boxes) of Action from Johal for $1500. During the March 13 purchase, after D.W. paid the money, Johal told him to go to the back storeroom and wait. D.W. said another store employee put the pills in a "Mike's Hard

Lemonade" box and put ice on top of the boxes of Action. Johal also told D.W. he had special-ordered matches and asked if D.W. wanted to buy them.

Earlier that same evening, by coincidence, a third party not working for the DEA, R.H., bought from Johal's store $950 worth of Action that R.H. had ordered in advance. DEA agents arrested R.H. as he was driving away from the store.

DEA agents amassed other corroborating evidence from transactions they observed and from their search of the store pursuant to a federal warrant. In a superseding indictment, the government charged Johal with two counts of distribution and one count of possession of a listed chemical in violation of 21 U.S.C. § 841(c)(2).

The first trial ended with a hung jury. One issue the first jury grappled with in its deliberations was the sufficiency of evidence needed to meet the "reasonable cause to believe" intent standard. Johal was retried and convicted on all counts. At sentencing, the district court judge granted Johal a downward departure but denied him an adjustment based on acceptance of responsibility. Johal timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

II.

Johal contends that 21 U.S.C. § 841(c)(2) impermissibly criminalizes conduct without imposing a mens rea requirement. We review de novo the proper interpretation of a statute. *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir. 2003). In determining what mental state is required to prove a violation of the statute, we look to its

words and the intent of Congress. *See United States v. Nguyen*, 73 F.3d 887, 890 (9th Cir. 1995). In doing so, we construe the statute "in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples v. United States*, 511 U.S. 600, 605 (1994) (citation omitted) (noting that the existence of a mens rea is the rule rather than the exception in Anglo-American criminal jurisprudence); *see Nguyen*, 73 F.3d at 890 (emphasizing the "fundamental principle that a person is not criminally responsible unless 'an evil-meaning mind' accompanies 'an evil-doing hand'" (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952))).

[1] Section 841(c)(2) punishes

> Any person who knowingly or intentionally –
>
> (2) possesses or distributes a listed chemical *knowing, or having reasonable cause to believe,* that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter.

(Emphasis added.) Pseudoephedrine is a listed chemical under the statute, 21 U.S.C. § 802(34)(K); but it is also a common ingredient in nonprescription cold medicines. Johal, supported by amicus curiae the National Association of Criminal Defense Lawyers, argues that the statute converts the legitimate sale of decongestants containing pseudoephedrine into a criminal act, putting unwitting store clerks at risk of going to prison simply for selling legal cold medications. He asserts this problem arises because "reasonable cause to believe" calls for interpreting what a reasonable person objectively would have known and done under the circumstances, imposing liability

without any showing of the defendant's *actual* criminal intent.

[2] We reject Johal's argument because the statute does impose a mens rea requirement, as indicated in our previous decision in *United States v. Kaur,* 382 F.3d 1155, 1157(9th Cir. 2004), a case arising out of the same DEA operation that led to Johal's arrest. There, we evaluated – albeit under an abuse of discretion standard – a jury instruction identical to the one given here that defined "reasonable cause to believe" in § 841(c)(2) as

> to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance.

Id. at 1156.

[3] Relying on *Kaur,* we hold that "reasonable cause to believe," in the context of § 841(c)(2), requires that a defendant subjectively know facts that either cause him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. This standard limits the likelihood that a defendant will be prosecuted for mere inadvertent conduct and is consistent with the longstanding principle presuming a mens rea requirement for criminal activity. *See Nguyen,* 73 F.3d at 890-91.[1]

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[1] Section 841(c)(2) is unlike the statutes at issue in *Nguyen* or in *Staples v. United States,* 511 U.S. 600, 605 (1994), neither of which specified a mens rea requirement at all. Here, we need not read a mental state requirement into the statute, because it already limits

(Continued on following page)

[4] We also reject Johal's argument that the "reasonable cause to believe" standard requires proving actual, subjective knowledge of the purchaser's intended illegal use of the pills. Such a reading would be redundant because the statute already provides for conviction based on a defendant's actual knowledge of the intended illegal use. *See Kaur*, 382 F.3d at 1157 (noting that "the statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge"). However, reasonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant* in a particular case – facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs. As a practical matter, therefore, the differences between actual and constructive "knowledge" under the statute are not substantial. *See United States v. Saffo*, 227 F.3d 1260, 1268-69 (10th Cir. 2000) (holding that the "reasonable cause to believe" standard in § 841(c)(2) "requires scienter to be evaluated through the lens of this particular defendant, rather than from the [perspective] of a hypothetical reasonable man" and likening the standard to actual knowledge); *Stoianoff v. Montana*, 695 F.2d 1214, 1221 (9th Cir. 1983) (holding, in construing a drug paraphernalia statute, that "the fact that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge").

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criminal punishment to those who acted "knowing or having reasonable cause to believe" that illegal activity was afoot.

[5] The government presented evidence from which the jury could find that Johal had a sufficient mens rea to violate the statute. The jury heard testimony about the various sales and Johal's own statements and conduct in the course of those transactions suggesting that Johal knew (or surely should have known) the proposed illegal use of the pseudoephedrine pills. He clearly was aware of the sales of Action in bulk quantities to repeat purchasers (the DEA agent and informants) and to R.H.; and the DEA Officer specifically told Johal that he was going to make "crystal." Johal's own behavior – such as concealing the packages in a box and having employees hand them to customers in the back room – was strong circumstantial evidence that Johal knew he was selling Action for an illicit use. At the very least, the circumstances of these sales would have alerted a reasonable person that the Action pills were being bought to make methamphetamine, not to cure runny noses. The evidence was thus sufficient to show that Johal had the requisite criminal intent to violate the statute.

III.

Johal claims that the statute requires the actual production of methamphetamine as an element of the offense. He argues that because he was indicted during two sting operations – neither of which resulted in the actual manufacture of an illegal drug – there is insufficient evidence to sustain his conviction.

[6] The text of § 841(c)(2) requires that the defendant know or have reasonable cause to believe that the chemical he sells "*will be used* to manufacture" a controlled substance. (Emphasis added.) The district court interpreted

this phrase to require only that the defendant believe such production would occur, not that the ingredients actually be used to make drugs. The jury instruction specifically stated that "the government does not have to prove that any pseudoephedrine actually was used to manufacture a controlled substance."

[7] We agree with the district court's reading of the statute. The commission of the crime – the actus reus – occurs at the moment a defendant possesses or distributes a listed ingredient while knowing or having reasonable cause to believe the chemical will be used to make drugs. Thus, a defendant violates the statute based on his understanding that he or she is contributing to the production of illicit drugs, even if the drugs ultimately are not made. *See United States v. Prather,* 205 F.3d 1265, 1269 (11th Cir. 2000) (holding that the plain language of the statute indicates that "Congress did not intend to require proof that the controlled substance had actually been manufactured"); *United States v. Green,* 779 F.2d 1313, 1319 (7th Cir. 1985) (holding that proof of the actual manufacture of drugs using the prohibited chemical was not necessary since the statute required knowledge or a reasonable cause to believe that the manufacturing of the drugs *will* in the future come to pass). Actual production may very well bolster the circumstantial evidence of a defendant's awareness of his or her participation in an illegal activity, but it is not compelled by a plain reading of the statute.

IV.

Johal challenges the jury instructions for failing to ensure a unanimous verdict on one of the two counts. Johal was indicted for (and the jury instructions charged

him with) the sale of Action for the making of methamphetamine on March 13, 2002 (Count II). There were two separate transactions on that day, however. The first occurred when Johal sold drugs to R.H., the third party who was apprehended leaving Johal's store with a large quantity of pre-ordered Action. Later that day, DEA informant D.W. purchased a case of pills from Johal.

The jury instructions did not distinguish between the two sales, but required the jury only to find beyond a reasonable doubt "that on or about March 13, 2002, the Defendant knowingly distributed pseudoephedrine" with the "knowledge or reasonable cause to believe that it will be used to manufacture a controlled substance." The district court also gave a general unanimity instruction, telling the jury that "a verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. A verdict must be unanimous." The instructions alerted the jury that "[t]he Defendant is not on trial for any conduct or offense not charged in the indictment" and that it may consider evidence of other acts "only as it bears upon the Defendant's intent, knowledge, motive, opportunity, and absence of mistake to commit the crimes charged and for no other purpose."

Johal did not raise below his objection that the district court failed to instruct the jury that it had to agree unanimously on the same sale of the two transactions that occurred on March 13. Nor did Johal request a polling of the jury to determine which transaction formed the basis of each juror's guilty verdict. We, therefore, review his claim for plain error and conclude that the district court's instructions were not plainly erroneous. *See United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir.) (noting that

plain error requires an (1) error, (2) that is plain and (3) that affects substantial rights and concluding that the given jury instructions did not meet those conditions), *cert. denied,* 540 U.S. 858 (2003).

Johal cites *United States v. Garcia-Rivera,* 353 F.3d 788 (9th Cir. 2003), but that case is distinguishable. There the district court instructed the jury that to find the defendant guilty it had to find beyond a reasonable doubt that possession occurred: "(a) uninterrupted between May 19, 2001 and June 7, 2001; or (b) about a week after the purchase of the firearm, or (c) on June 7, 2001." *Id.* at 790. The court further instructed that the jury "must unanimously agree that the possession occurred during (a) above, *or* on (b) *or* (c) above." *Id.* at 792 (emphasis in the original). We found the phrasing "fatally ambiguous. The jury could have concluded that they were required to decide unanimously only that possession occurred during *any* of the three times enumerated, not that they had to unanimously agree on which one." *Id.* (emphasis in the original); *see also United States v. Echeverry,* 698 F.2d 375, 377-78 (9th Cir. 1983), *amended by* 719 F.2d 974 (per curiam) (reversing the defendant's conviction where jurors were instructed they could convict if they found the existence of a conspiracy for "some period of time" within the six months covered in the indictment, because different jurors may have concluded that the defendant committed different acts).

[8] The concern that jurors may have convicted Johal, even though they did not agree on which of the two transactions actually occurred on March 13, is not material. Johal does not dispute that he sold large quantities of pseudoephedrine to both R.H. and D.W. on the day in question. Rather, the conviction turned on whether Johal

had the requisite knowledge that the sales of Action were for the production of illegal drugs. The jurors could properly consider the evidence from both sales in deciding that Johal had the intent to commit the crime.[2] *See United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983) (rejecting the claim that a unanimity instruction must be tailored to the particular charges in a case where "the various acts indicating knowing possession were not inconsistent with each other; and even if one set of jurors might have focused on one part of the transaction while another set focused upon a different part, it does not follow that either set of jurors were in disagreement with the other"). Accordingly, there was no plain error in the jury instructions regarding the March 13 count.

V.

[9] Johal contends that the district court erred in denying him a reduction of his sentence for acceptance of responsibility, a claim we review for clear error. *See United States v. Fleming*, 215 F.3d 930, 939 (9th Cir. 2000). At sentencing, Johal acknowledged selling large amounts of pseudoephedrine but stated that he "did not know that this was a violation of a federal law." He argues that because he admitted the actus reus of the crime – distributing the chemical ingredient – he should have been eligible for a sentence reduction. However, our case law makes clear that the reduction is inappropriate where the defendant does not admit that he or she had the intent to

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[2] Our consideration of the jury unanimity challenge might have been different had the sales at issue occurred over the course of a more extended period of time or had the occurrence of the sales been disputed.

commit the crime. *See id.* (upholding district court's refusal to grant reduction where the defendant attempted to accept responsibility but denied the intent element of the offense); *United States v. Ing*, 70 F.3d 553, 556 (9th Cir. 1995) (holding that district court clearly erred in denying reduction where the defendant raised an entrapment defense, but "admitted his conduct and his intent throughout"); *United States v. Burrows*, 36 F.3d 875, 883 (9th Cir. 1994) (holding that the defendant was not entitled to adjustment where during and after trial he maintained that he lacked mens rea). Johal did not admit that he had the intent to distribute the chemical-containing cold pills for the purpose of making illegal drugs. Accordingly, the court did not clearly err by denying him a sentence adjustment based on his acceptance of responsibility.

[10] Nonetheless, the Sentencing Guidelines are no longer mandatory, and we cannot determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. *See United States v. Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc). Accordingly, the district court should reconsider Johal's sentence in light of *Ameline*.

VI.

The conviction is **AFFIRMED** and the case is **REMANDED** for reconsideration of Johal's sentence.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amicus, v. JOGA SINGH JOHAL, Defendant-Appellant.	No. 03-30579 D.C. No. CR-02-00214-FVS ORDER (Filed Oct. 14, 2005)

Before: SCHROEDER, Chief Judge, GRABER and FISHER, Circuit Judges.

The panel has voted to the deny the petition for rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehearing [sic] the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc, filed September 13, 2005, is **DENIED**.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOGA SINGH JOHAL, Defendant-appellant.

No. 03-30579

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

421 F.3d 955; 2005 U.S. App. LEXIS 18754

January 10, 2005, Argued and Submitted, Seattle, Washington August 30, 2005 Filed

COUNSEL: Sheryl Gordon McCloud, Law Office of Sheryl Gordon McCloud, Seattle, Washington, for the defendant-appellant.

Russell E. Smoot, Assistant United States Attorney, Spokane, Washington, for the plaintiff-appellee.

Allen R. Bentley, Law Office of Allen R. Bentley, Seattle, Washington, for amicus curiae, National Association of Criminal Defense Lawyers.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Susan P. Graber and Raymond C. Fisher, Circuit Judges.

OPINION BY: Raymond C. Fisher

OPINION: FISHER, Circuit Judge:

Joga Singh Johal appeals his conviction for selling and possessing large quantities of over-the-counter cold pills containing the ingredient pseudoephedrine "knowing or having reasonable cause to believe" that they would be used to manufacture methamphetamine, an illegal substance under 21 U.S.C. § 841(c)(2). Johal argues that § 841(c)(2) impermissibly imposes criminal liability without a mens rea requirement and that it mandates that the

illegal substance actually be produced, foreclosing his conviction under a sting operation. Johal also alleges that the jury instructions failed to ensure a unanimous verdict and that the district court should have found him eligible for a sentence reduction because of his acceptance of responsibility.

We reject Johal's contention that a "reasonable cause to believe" standard, as construed and applied here, permits a defendant to be convicted without a showing of any criminal intent. Instead, the standard incorporates both subjective and objective considerations to ensure the defendant had a sufficiently "guilty mind" in violating the statute. We further hold that a conviction under the statute does not require that the illegal drug actually be manufactured. We also conclude that the trial court did not err in its jury instructions or in denying Johal a reduction for acceptance of responsibility.

I.

Johal is the owner of a grocery business in Spokane, Washington, called J & K Gas & Grocery. He invested in the store in 1995, some 10 years after he emigrated to the United States.

Beginning in the winter of 2001, the Drug Enforcement Agency ("DEA") began surveilling Johal's grocery store and a number of other convenience stores in the area. The DEA suspected that grocery store owners were selling excessive quantities of pseudoephedrine to individuals, who then used the ingredient to make methamphetamine.

Pseudoephedrine is a chemical ingredient in a number of cold medicines that can be purchased over-the-counter without a prescription. However, pseudoephedrine, when extracted from cold pills and mixed with other chemicals, is also used to manufacture methamphetamine. Certain brands of pseudoephedrine pills, including Action brand, facilitate the process of extraction because they do not have a coating on them.

Johal carried Action brand pseudoephedrine. At some point, he stopped stocking Action cold pills on the shelves because he said people were stealing them, and instead began keeping the medicine behind the counter and in the back room of the store.

The government indicted Johal based on a series of transactions in which he sold large amounts of Action cold pills to real or ostensible customers. On March 7, 2002, he sold 61 boxes of Action to Pascale Hostetler, who had agreed to participate in a DEA undercover sting operation against Johal's store in exchange for having criminal charges against her dropped. Hostetler entered the store and bought three boxes while a DEA Task Force Officer Scott McNall – working undercover – waited in a car outside the store. She left the store and then re-entered with McNall. In the next half hour, McNall and Hostetler each made multiple three-box purchases. McNall asked Johal if they could buy more. McNall testified that he told Johal he wanted a case of Action because he was a cook and wanted to make "crystal," a shorthand reference to crystal methamphetamine. Johal told the two to return to the store later that evening. They returned after the store closed, and Johal sold Hostetler 40 more boxes of Action.

The second controlled purchase occurred on March 13, by DEA informant Dan Wooten. Wooten just a week earlier had purchased from Johal's store a case of matches, which have red phosphorous tips that also are used in methamphetamine production. After that transaction, DEA agents pulled Wooten over in his car and found methamphetamine and other ingredients used to make the drug. Wooten agreed to cooperate with the DEA, and the next week he purchased a case (144 boxes) of Action from Johal for $1500. During the March 13 purchase, after Wooten paid the money, Johal told him to go to the back storeroom and wait. Wooten said another store employee put the pills in a Mike's Hard Lemonade box and put ice on top of the boxes of Action. Johal also told Wooten he had special-ordered matches and asked if Wooten wanted to buy them.

Earlier that same evening, by coincidence, a third party not working for the DEA, Robert Henjum, bought from Johal's store $950 worth of Action that Henjum had ordered in advance. DEA agents arrested Henjum as he was driving away from the store.

DEA agents amassed other corroborating evidence from transactions they observed and from their search of the store pursuant to a federal warrant. In a superseding indictment, the government charged Johal with two counts of distribution and one count of possession of a listed chemical in violation of 21 U.S.C. § 841(c)(2).

The first trial ended with a hung jury. One issue the first jury grappled with in its deliberations was the sufficiency of evidence needed to meet the "reasonable cause to believe" intent standard. Johal was retried and convicted on all counts. At sentencing, the district court judge granted Johal a downward departure but denied him an

adjustment based on acceptance of responsibility. Johal timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

II.

Johal contends that 21 U.S.C. § 841(c)(2) impermissibly criminalizes conduct without imposing a mens rea requirement. We review de novo the proper interpretation of a statute. *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir. 2003). In determining what mental state is required to prove a violation of the statute, we look to its words and the intent of Congress. *See United States v. Nguyen,* 73 F.3d 887, 890 (9th Cir. 1995). In doing so, we construe the statute "in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples v. United States,* 511 U.S. 600, 605, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (citation omitted) (noting that the existence of a mens rea is the rule rather than the exception in Anglo-American criminal jurisprudence); *see Nguyen,* 73 F.3d at 890 (emphasizing the "fundamental principle that a person is not criminally responsible unless 'an evil-meaning mind' accompanies 'an evil-doing hand'" (quoting *Morissette v. United States,* 342 U.S. 246, 251, 96 L. Ed. 2d 288, 72 S. Ct. 240 (1952))).

Section 841(c)(2) punishes

> Any person who knowingly or intentionally –
>
> (2) possesses or distributes a listed chemical *knowing, or having reasonable cause to believe,* that the listed chemical will be used to manufacture a controlled substance except as authorized by this sub-chapter.

(Emphasis added.) Pseudoephedrine is a listed chemical under the statute, 21 U.S.C. § 802(34)(K); but it is also a common ingredient in nonprescription cold medicines. Johal, supported by amicus curiae the National Association of Criminal Defense Lawyers, argues that the statute converts the legitimate sale of decongestants containing pseudoephedrine into a criminal act, putting unwitting store clerks at risk of going to prison simply for selling legal cold medications. He asserts this problem arises because "reasonable cause to believe" calls for interpreting what a reasonable person objectively would have known and done under the circumstances, imposing liability without any showing of the defendant's *actual* criminal intent.

We reject Johal's argument because the statute does impose a mens rea requirement, as indicated in our previous decision in *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004), a case arising out of the same DEA operation that led to Johal's arrest. There, we evaluated – albeit under an abuse of discretion standard – a jury instruction identical to the one given here that defined "reasonable cause to believe" in § 841(c)(2) as

> to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance.

Id. at 1156.

Relying on *Kaur*, we hold that "reasonable cause to believe," in the context of § 841(c)(2), requires that a defendant subjectively know facts that either cause him or

would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. This standard limits the likelihood that a defendant will be prosecuted for mere inadvertent conduct and is consistent with the longstanding principle presuming a mens rea requirement for criminal activity. *See Nguyen,* 73 F.3d at 890-91.[1]

We also reject Johal's argument that the "reasonable cause to believe" standard requires proving actual, subjective knowledge of the purchaser's intended illegal use of the pills. Such a reading would be redundant because the statute already provides for conviction based on a defendant's actual knowledge of the intended illegal use. *See Kaur,* 382 F.3d at 1157 (noting that "the statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge"). However, reasonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant* in a particular case – facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs. As a practical matter, therefore, the differences between actual and constructive "knowledge" under the statute are not substantial. *See United States v. Saffo,* 227 F.3d 1260, 1268-69 (10th Cir. 2000) (holding that the

[1] Section 841(c)(2) is unlike the statutes at issue in *Nguyen* or in *Staples v. United States,* 511 U.S. 600, 605, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994), neither of which specified a mens rea requirement at all. Here, we need not read a mental state requirement into the statute, because it already limits criminal punishment to those who acted "knowing or having reasonable cause to believe" that illegal activity was afoot.

"reasonable cause to believe" standard in § 841(c)(2) "requires scienter to be evaluated through the lens of this particular defendant, rather than from the [perspective] of a hypothetical reasonable man" and likening the standard to actual knowledge); *Stoianoff v. Montana,* 695 F.2d 1214, 1221 (9th Cir. 1983) (holding, in construing a drug paraphernalia statute, that "the fact that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge").

The government presented evidence from which the jury could find that Johal had a sufficient mens rea to violate the statute. The jury heard testimony about the various sales and Johal's own statements and conduct in the course of those transactions suggesting that Johal knew (or surely should have known) the proposed illegal use of the pseudoephedrine pills. He clearly was aware of the sales of Action in bulk quantities to repeat purchasers (the DEA agent and informants) and to Henjum; and the McNall specifically told Johal that he was going to make "crystal." Johal's own behavior – such as concealing the packages in a box and having employees hand them to customers in the back room – was strong circumstantial evidence that Johal knew he was selling Action for an illicit use. At the very least, the circumstances of these sales would have alerted a reasonable person that the Action pills were being bought to make methamphetamine, not to cure runny noses. The evidence was thus sufficient to show that Johal had the requisite criminal intent to violate the statute.

III.

Johal claims that the statute requires the actual production of methamphetamine as an element of the offense. He argues that because he was indicted during two sting operations – neither of which resulted in the actual manufacture of an illegal drug – there is insufficient evidence to sustain his conviction.

The text of § 841(c)(2) requires that the defendant know or have reasonable cause to believe that the chemical he sells "*will be used* to manufacture" a controlled substance. (Emphasis added.) The district court interpreted this phrase to require only that the defendant believe such production would occur, not that the ingredients actually be used to make drugs. The jury instruction specifically stated that "the government does not have to prove that any pseudoephedrine actually was used to manufacture a controlled substance."

We agree with the district court's reading of the statute. The commission of the crime – the actus reus – occurs at the moment a defendant possesses or distributes a listed ingredient while knowing or having reasonable cause to believe the chemical will be used to make drugs. Thus, a defendant violates the statute based on his understanding that he or she is contributing to the production of illicit drugs, even if the drugs ultimately are not made. *See United States v. Prather,* 205 F.3d 1265, 1269 (11th Cir. 2000) (holding that the plain language of the statute indicates that "Congress did not intend to require proof that the controlled substance had actually been manufactured"); *United States v. Green,* 779 F.2d 1313, 1319 (7th Cir. 1985) (holding that proof of the actual manufacture of drugs using the prohibited chemical was not necessary

since the statute required knowledge or a reasonable cause to believe that the manufacturing of the drugs *will* in the future come to pass). Actual production may very well bolster the circumstantial evidence of a defendant's awareness of his or her participation in an illegal activity, but it is not compelled by a plain reading of the statute.

IV.

Johal challenges the jury instructions for failing to ensure a unanimous verdict on one of the two counts. Johal was indicted for (and the jury instructions charged him with) the sale of Action for the making of methamphetamine on March 13, 2002 (Count II). There were two separate transactions on that day, however. The first occurred when Johal sold drugs to Robert Henjum, the third party who was apprehended leaving Johal's store with a large quantity of pre-ordered Action. Later that day, DEA informant Wooten purchased a case of pills from Johal.

The jury instructions did not distinguish between the two sales, but required the jury only to find beyond a reasonable doubt "that on or about March 13, 2002, the Defendant knowingly distributed pseudoephedrine" with the "knowledge or reasonable cause to believe that it will be used to manufacture a controlled substance." The district court also gave a general unanimity instruction, telling the jury that "a verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. A verdict must be unanimous." The instructions alerted the jury that "the Defendant is not on trial for any conduct or offense not charged in the indictment" and that it may consider

evidence of other acts "only as it bears upon the Defendant's intent, knowledge, motive, opportunity, and absence of mistake to commit the crimes charged and for no other purpose."

Johal did not raise below his objection that the district court failed to instruct the jury that it had to agree unanimously on the same sale of the two transactions that occurred on March 13. Nor did Johal request a polling of the jury to determine which transaction formed the basis of each juror's guilty verdict. We, therefore, review his claim for plain error and conclude that the district court's instructions were not plainly erroneous. *See United States v. Franklin,* 321 F.3d 1231, 1240 (9th Cir.) (noting that plain error requires an (1) error, (2) that is plain and (3) that affects substantial rights and concluding that the given jury instructions did not meet those conditions), *cert. denied,* 540 U.S. 858, 157 L. Ed. 2d 106, 124 S. Ct. 161 (2003).

Johal cites *United States v. Garcia-Rivera,* 353 F.3d 788 (9th Cir. 2003), but that case is distinguishable. There the district court instructed the jury that to find the defendant guilty it had to find beyond a reasonable doubt that possession occurred: "(a) uninterrupted between May 19, 2001 and June 7, 2001; or (b) about a week after the purchase of the firearm, or (c) on June 7, 2001." *Id.* at 790. The court further instructed that the jury "must unanimously agree that the possession occurred during (a) above, *or* on (b) *or* (c) above." *Id.* at 792 (emphasis in the original). We found the phrasing "fatally ambiguous. The jury could have concluded that they were required to decide unanimously only that possession occurred during *any* of the three times enumerated, not that they had to unanimously agree on which one." *Id.* (emphasis in the

original); *see also United States v. Echeverry,* 698 F.2d 375, 377-78 (9th Cir. 1983), *amended by* 719 F.2d 974 (per curiam) (reversing the defendant's conviction where jurors were instructed they could convict if they found the existence of a conspiracy for "some period of time" within the six months covered in the indictment, because different jurors may have concluded that the defendant committed different acts).

The concern that jurors may have convicted Johal, even though they did not agree on which of the two transactions actually occurred on March 13, is not material. Johal does not dispute that he sold large quantities of pseudoephedrine to both Henjum and Wooten on the day in question. Rather, the conviction turned on whether Johal had the requisite knowledge that the sales of Action were for the production of illegal drugs. The jurors could properly consider the evidence from both sales in deciding that Johal had the intent to commit the crime.[2] *See United States v. Ferris,* 719 F.2d 1405, 1407 (9th Cir. 1983) (rejecting the claim that a unanimity instruction must be tailored to the particular charges in a case where "the various acts indicating knowing possession were not inconsistent with each other; and even if one set of jurors might have focused on one part of the transaction while another set focused upon a different part, it does not follow that either set of jurors were in disagreement with the other"). Accordingly, there was no plain error in the jury instructions regarding the March 13 count.

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[2] Our consideration of the jury unanimity challenge might have been different had the sales at issue occurred over the course of a more extended period of time or had the occurrence of the sales been disputed.

V.

Johal contends that the district court erred in denying him a reduction of his sentence for acceptance of responsibility, a claim we review for clear error. *See United States v. Fleming*, 215 F.3d 930, 939 (9th Cir. 2000). At sentencing, Johal acknowledged selling large amounts of pseudoephedrine but stated that he "did not know that this was a violation of a federal law." He argues that because he admitted the actus reus of the crime – distributing the chemical ingredient – he should have been eligible for a sentence reduction. However, our case law makes clear that the reduction is inappropriate where the defendant does not admit that he or she had the intent to commit the crime. *See id.* (upholding district court's refusal to grant reduction where the defendant attempted to accept responsibility but denied the intent element of the offense); *United States v. Ing*, 70 F.3d 553, 556 (9th Cir. 1995) (holding that district court clearly erred in denying reduction where the defendant raised an entrapment defense, but "admitted his conduct and his intent throughout"); *United States v. Burrows*, 36 F.3d 875, 883 (9th Cir. 1994) (holding that the defendant was not entitled to adjustment where during and after trial he maintained that he lacked mens rea). Johal did not admit that he had the intent to distribute the chemical-containing cold pills for the purpose of making illegal drugs. Accordingly, the court did not clearly err by denying him a sentence adjustment based on his acceptance of responsibility.

Nonetheless, the Sentencing Guidelines are no longer mandatory, and we cannot determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. *See United States v. Ameline*, 409 F.3d

1073, 1074 (9th Cir. 2005) (en banc). Accordingly, the district court should reconsider Johal's sentence in light of *Ameline*.

VI.

The conviction is AFFIRMED and the case is REMANDED for reconsideration of Johal's sentence.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amicus, v. JOGA SINGH JOHAL, Defendant-Appellant.	No. 03-30579 D.C. No. CR-02-00214-FVS **JUDGMENT**

Filed and entered 08/30/05

Appeal from the United States District Court for the Eastern District of Washington (Spokane).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

UNITED STATES DISTRICT COURT
Eastern District of Washington

(Filed Jan. 14, 2004)

UNITED STATES OF AMERICA

V.

Joga Singh Johal

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:02CR00214-001

Date of Original/Amended Judgment: 12/18/03

Frank L. Cikutovich
Defendant's Attorney

☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, and 3 of the superseding indictment after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841(c)(2)	Distribution of Pseudoephedrine	8/13/05	1s, 2s & 3s

☐ See continuation page

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s)

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
607-14-8102

Defendant's Date of Birth:
01/02/1959

Defendant's USM No.: 10569-085

Defendant's Residence Address:
605 E. Wedgewood
Spokane, WA 99208

Defendant's Mailing Address:

Same

12/12/03
Date of Imposition of Judgment

/s/ Fred Van Sickle
Signature of Judicial Officer

The Honorable Fred L. Van Sickle
Name and Title of Judicial Officer

Chief Judge,
U.S. District Court

Date
January 13, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 month(s).

The term of 70 months for each count shall run concurrent.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant receive credit for federal time detained.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:

☐ at _____ on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☒ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term *3 years.

While on supervised release the defendant shall comply with the standard conditions of supervision adopted by this Court, except that the Mandatory Drug Testing is suspended. No special conditions are set for defendant.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 5,000.00 *	0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$0.00	$0.00	

☐ See continuation page

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☒ the interest requirement is waived for the ☒ fine and/or ☐ restitution. ☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D or, ☐ E below; or

B ☒ Payment to begin immediately (may be combined with C, D or, E below); or

C ☐ Payment in equal (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of week(s) (e.g., months or years), to commence

_____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall participate in the United States Bureau of Prisons Inmate Financial Responsibility Program. Payments may be made to the Clerk, U.S. District Court, Attention: Finance, P.O. Box 1493, Spokane, WA 99210-1493.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

☐ See continuation page

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Pursuant to Count 4 of the superseding indictment, a personal money judgment is entered against the

Defendant in the amount of $3,908.00 pursuant to 21 U.S.C. 853. The US District Court shall retain jurisdiction in the case for the purpose of enforcing this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
Eastern District of Washington

(Filed Dec. 18, 2003)

UNITED STATES OF AMERICA

V.

Joga Singh Johal

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:02CR00214-001

Frank L. Cikutovich
Defendant's Attorney

☐
☐

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2 and 3 of the superseding indictment after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841(c)(2)	Distribution of Pseudoephedrine	8/13/02	1s, 2s & 3s

☐ See continuation page

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s)

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
607-14-8102

Defendant's Date of Birth:
01/02/1959

Defendant's USM No.: 10569-085

Defendant's Residence Address:
605 E. Wedgewood
Spokane, WA 99208

Defendant's Mailing Address:
Same

12/12/03
Date of Imposition of Judgment

/s/ Fred Van Sickle
Signature of Judicial Officer

The Honorable Fred L. Van Sickle
Name and Title of Judicial Officer

Chief Judge,
U.S. District Court

Date
December 17, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 month(s).

The term of 70 months for each count shall run concurrent.

☒ The court makes the following recommendations to the Bureau of Prisons: The defendant receive credit for federal time detained.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States marshal for this district:
- ☐ at _____ on _____
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before _____ on _____
- ☐ as notified by the United States Marshal.
- ☒ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____

While on supervised release the defendant shall comply with the standard conditions of supervision adopted by this Court, except that the Mandatory Drug Testing is suspended. No special conditions are set for defendant.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as directed by the probation officer.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ 5,000.00	

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	†Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$0.00	$0.00	

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† Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☒ the interest requirement is waived for the ☒ fine and/or ☐ restitution. ☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

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Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D or, ☐ E below; or

B ☒ Payment to begin immediately (may be combined with C, D or, E below); or

C ☐ Payment in equal (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of week(s) (e.g., months or years), to commence

_____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:

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☐ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

☐ See continuation page

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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Pursuant to Count 4 of the superseding indictment, a personal money judgment is entered against the

Defendant in the amount of $3,908.00 pursuant to 21 U.S.C. 853. The US District Court shall retain jurisdiction in the case for the purpose of enforcing this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. KENNETH JOHN RASH, WILLIAM BINGHAM O'DELL, JOGA SINGH JOHAL, KULWINDER KAUR, GURCHAIT SINGH BAINS, MAKHAN SINGH BAINS, DHARAMJIT SINGH KHEHRA, SANTOKH SINGH, PARGAT SINGH, BALRAJ SINGH, MANJIT KAUR, LAURIS RICHARD GREEN, TODD PORTER, AMAMDEEP SINGH, Defendants.	ORDER RE MOTION TO DISMISS No. CR-02-212-FVS CR-02-213-FVS CR-02-214-FVS CR-02-215-FVS CR-02-216-FVS CR-02-217-FVS CR-02-218-FVS CR-02-219-FVS CR-02-220-FVS CR-02-223-FVS CR-02-224-FVS CR-02-225-FVS CR-02-250-FVS CR-02-259-FVS (Filed Feb. 4, 2003)

THE DEFENDANTS came before the Court for a pretrial conference on January 14, 2003. This order memorializes the Court's rulings with respect to a number of motions to dismiss, some of which overlapped.

FOUR DEFENDANTS ALLEGE 21 U.S.C. § 841(c)(2) IS VAGUE

Defendants Kenneth Rash, Gurchait Singh Bains, Makhan Bains, and Pargat Singh argue that 21 U.S.C. § 841(c)(2) is impermissibly vague to the extent it makes it unlawful for a person to distribute pseudoephedrine

"having reasonable cause to believe" it will be used to manufacture methamphetamine.

Ruling

Like other statutes, § 841(c)(2) is presumed constitutional. *See United States v. Harris,* 185 F.3d 999, 1003 (9th Cir.1999), *cert. denied,* 528 U.S. 1055, 120 S.Ct. 600, 145 L.Ed.2d 498 (1999). "Where . . . a statute is challenged as unconstitutionally vague in a cause of action not involving the First Amendment, [courts] do not consider, whether the statute is unconstitutional on its face." *United States v. Purdy,* 264 F.3d 809, 812 (9th Cir.2001) (citing *United States v. Ocegueda,* 564 F.2d 1363, 1366 (9th Cir.1977)). Instead, the issue "is whether the statute is impermissibly vague in the circumstances of [the] case." *Id.* (internal punctuation and citation omitted). *See also Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486 (9th Cir.1996) (same). This type of review cannot be done adequately until the record is fully developed at trial. *Cf. Purdy,* 264 F.3d at 811-12 (vagueness challenge resolved based upon evidence presented at trial); *United States v. Moore,* 109 F.3d 1456, 1466-67 (9th Cir.) (same), *cert. denied,* 522 U.S. 836, 118 S.Ct. 108, 139 L.Ed.2d 61 (1997). Consequently, the Court reserves ruling with respect to the defendants' vagueness challenge with leave for them to renew their challenge when the record has been developed more fully.

DEFENDANT KENNETH RASH CHALLENGES COUNT

Count 1 of the Indictment filed in CR-02-212-FVS charges Kenneth Rash with conspiring to distribute

pseudoephedrine in violation of § 841(c)(2). Mr. Rash argues that Count 1, as framed, does not satisfy the pleading standards of Federal Rule of Criminal Procedure 7(c)(1), which requires an indictment to set forth a "plain, concise and definite written statement of the essential facts constituting the offense charged." Believing, as he does, that the having-reasonable-cause-to-believe clause is unconstitutionally vague, he submits that an indictment that merely tracks the language of § 841(c) (2) is insufficiently precise. In his opinion, Count 1 must describe the conduct that gave him reasonable cause to believe his sales of pseudoephedrine were illegal.

Ruling

The test for sufficiency under Rule 7(c)(1) is well established. A legally sufficient indictment must state the elements of the offense charged with sufficient clarity to put defendant Rash on notice of the charge against which he must defend and to enable him to plead double jeopardy. *United States v. Givens,* 767 F.2d 574, 584 (9th Cir.1985) (citation omitted). "'An indictment which tracks the words of the statute charging the offense is sufficient so long as the words unambiguously set forth all elements necessary to constitute the offense," *United States v. Fitzgerald,* 882 F.2d 397, 399 (9th Cir.1989) (quoting *Givens,* 767 F.2d at 584). Here, the indictment alleges that defendant Rash (1) entered into a conspiracy (2) to distribute approximately 8,570,880 pseudoephedrine pills (3) in violation of § 841(c)(2). That is enough to satisfy Rule 7(c)(1).

Two additional points need to be made. In effect, defendant Rash is demanding that the government allege

an overt act. As the government points out, the Supreme Court has held that § 846 does not require proof of an overt act. *United States v. Shabani,* 513 U.S. 10, 15, 115 S.Ct. 382, 385, 130 L.Ed.2d 225 (1994). Furthermore, Mr. Rash's 7(c)(1) argument is based, for the most part, upon his allegation that the having-reasonable-cause-to-believe clause is unconstitutionally vague. Not only is his vagueness challenge premature, but also it is unlikely to succeed if the Ninth Circuit follows the lead of the Tenth Circuit. *See, e.g., United States v. Saffo,* 227 F.3d 1260, 1270 (10th Cir.2000) (interpreting the statute that preceded § 841(c)(2)), *cert. denied,* 532 U.S. 974, 121 S.Ct. 1608, 149 L.Ed.2d 473 (2001).

DEFENDANT MANJIT KAUR CLAIMS SHE IS EXEMPT FROM PROSECUTION

Defendant Manjit Kaur operates Sunset Food Mart. She moves to dismiss on the ground that she is exempt from prosecution under § 841(c)(2). To understand her argument, it is necessary to review several provisions of the Comprehensive Methamphetamine Control Act of 1996 ("CMCA"). The Sunset Food Mart arguably is a "grocery store" within the meaning of the CMCA. A grocery store that sells pseudoephedrine is a "retail distributor." 21 U.S.C. § 802(46)(A). A retail distributor is a type of 'regulated person." 21 U.S.C. § 802(38). Under the CMCA, a regulated person who engages in a "regulated transaction," 21 U.S.C. § 802(39), involving pseudoephedrine must keeps certain records and file certain reports. 21 U.S.C. § 830. *See United States v. Daas,* 198 F.3d 1167, 1176 (9th Cir.1999). However, there are exceptions to these requirements. The "sale of ordinary over-the-counter pseudoephedrine . . . products by retail distributors shall not be

a regulated transaction (except as provided in section 401(d) of the Comprehensive Methamphetamine Control Act of 1996)[.]" 21 U.S.C. § 802(39)(A)(v)(I)(aa). Based upon 21 U.S.C. § 802(39)(A)(iv)(I)(aa), Ms. Kaur assumes that the sales of pseudoephedrine that occurred at her store were exempt from the record-keeping and reporting requirements imposed by the CMCA. According to her, the fact that Congress exempted the pseudoephedrine transactions at her store from the CMCA's record-keeping and reporting requirements indicates that Congress intended to exempt her from prosecution under 21 U.S.C. § 841(c)(2). She is incorrect. The Ninth Circuit has held that regulatory provisions are not evidence of congressional intent to exempt a person from prosecution under the Controlled Substances Act. *Daas*, 198 F.3d at 1177, Consequently, Ms. Kaur's motion to dismiss will be denied.

IT IS HEREBY ORDERED:

1. The Court reserves ruling on the defendants' motion to dismiss on the ground that 21 U.S.C. § 841(c)(2) is impermissibly vague to the extent it makes it unlawful for a person to distribute pseudoephedrine "having reasonable cause to believe" it will be used to manufacture methamphetamine.[1]

2. The Court denies Kenneth Rash's motion to dismiss Count 1 in CR-02-212-FVS on the ground that it is insufficiently specific under Rule 7(c)(1).[2]

---

[1] In CR-02-212-FVS, this is court record number 47. In CR-02-216-FVS, this is court record number 43. In CR-02-220-FVS, this is court record number 49.

[2] This motion is included within court record number 47.

3. The Court denies Manjit Kaur's motion to dismiss on the ground that she is exempt from prosecution under 21 U.S.C. § 843 (c)(2).[3]

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 3rd day of February, 2003.

/s/ Fred Van Sickle
Fred Van Sickle
Chief United States
District Judge

[3] In CR-02-224-FVS, this is court record number 42.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, versus JOGA JOHAL, Defendant.	No. CR-02-214-FVS January 14, 2003 Spokane, Washington Pages 1-96

TRANSCRIPT OF PROCEEDINGS
PRETRIAL HEARING
BEFORE THE HONORABLE FRED L. VAN SICKLE

* * *

[28] facially challenge the constitutionality of the statute. On the basis that it is vague. Particularly the language that's been indicated as to whether or not the reasonable cause to believe portion of the statute is so vague as to not advise a, any person of what the law is.

The Ninth Circuit has, in the *United States versus Purdy*, which is a 2001 case at 264 F.3d, 809, indicated and said, "Where a statute is challenged as unconstitutionally vague, in a cause of action that does not involve the First Amendment, the Courts do not consider whether the statute is unconstitutional on its face."

It's clear that what then is contemplated is whether or not the statute is impermissibly vague as it relates to each case.

If you will, if it – I think the essence of the Ninth Circuit law is in a case where a statute is, does not involve

a challenge on the basis of the First Amendment, a facial challenge is not to be considered. But, and a challenge as applied is appropriate. And that seems to be, as I view it, the rule here. And as such, the motion to dismiss for unconstitutionality on the face of the statute would be denied. With, clearly, the provision that this issue can be raised in each case as it relates to the particular facts and circumstances of that case.

I believe that's the law in this circuit. And the [29] question of whether or not the allegations comply with Rule 7 C 1, in the sense that they require and provide a plain, concise and definite written statement of the essential facts constituting the offense alleged or charged, in reviewing the allegations particularly as they relate to Mr. Rash, and but also others, I believe that they are, they do provide sufficient, plain and concise allegations containing the information.

That's interrelated with this language that's been a concern. I appreciate that. And that again is, under the law, something that can be addressed in each case as it's applied and it may well be the only way to do that is at the end of the government's case. If there's another way, it's certainly considered. But that's how I view the law now, as it now stands in the Ninth Circuit.

Counsel then and parties, we will recess at this juncture to take up in this matter at 1:15 and proceed on with the other motions addressed to dismiss and then other motions in regard to this cause, including particularly severance, as well as then discovery issues and like. And proceed on with this, the motions in this cause. So Court will be in the noon recess. We'll take up at 1:15.

(Whereupon Court was recessed at 12:00 p.m.)

(Whereupon Court reconvened
in the courtroom at 1:20 p.m.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOGA SINGH JOHAL, Defendant.	No. CR-02-214-FVS

COURT'S INSTRUCTIONS TO THE JURY

(Filed Aug. 6, 2003)

DATED this 6th day of August, 2003.

/s/ Fred Van Sickle
FRED VAN SICKLE
CHIEF UNITED STATES
DISTRICT JUDGE

* * *

INSTRUCTION NO. 6

Joga Singh Johal is charged in Count 1 with the crime of distributing pseudoephedrine, a listed chemical, knowing or having reasonable cause to believe it would be used to manufacture a controlled substance in violation of the laws of the United States. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that on or about March 7, 2002, the defendant knowingly distributed pseudoephedrine;

Second, that pseudoephedrine is a listed chemical; and

Third, that the defendant distributed the pseudoephedrine with knowledge, or reasonable cause to believe, that it would be used to manufacture a controlled substance.

It does not matter whether the defendant knew that pseudoephedrine is a listed chemical.

INSTRUCTION NO. 7

Joga Singh Johal is charged in Count 2 with the crime of distributing pseudoephedrine, a listed chemical, knowing or having reasonable cause to believe it would be used to manufacture a controlled substance in violation of the laws of the United States. In order for the defendant to be found guilty of that charge, the government must pore each of the following elements beyond a reasonable doubt:

First, that on or about March 13, 2002, the defendant knowingly it distributed pseudoephedrine;

Second, that pseudoephedrine is a listed chemical; and

Third, that defendant distributed the pseudoephedrine with knowledge, or reasonable cause to believe, that it would be used to manufacture a controlled substance.

It does not matter whether the defendant knew that pseudoephedrine is a listed chemical.

INSTRUCTION NO 8

Joga Singh Johal is charged in Count 3 with the. crime of possessing pseudoephedrine, a listed chemical, knowing or having reasonable cause to believe it would be used to manufacture a controlled substance in violation of

the laws of the United States. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that on or about August 13, 2002, the defendant knowingly possessed pseudoephedrine;

Second, that pseudoephedrine is a listed chemical; and

Third, that the defendant possessed the pseudoephedrine with knowledge, or reasonable cause to believe, that it would be used to manufacture a controlled substance.

It does not matter whether the defendant knew that pseudoephedrine is a listed chemical.

INSTRUCTION NO. 9

The government does not have to prove that any pseudoephedrine actually was used to manufacture a controlled substance.

* * *

INSTRUCTION NO. 12

"Reasonable cause to believe" means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance.

* * *

(2)

Supreme Court, U.S.
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No. 05-1018

In the Supreme Court of the United States

JOGA SINGH JOHAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in its jury instruction explaining the criminal intent required for conviction under 21 U.S.C. 841(c)(2), which proscribes knowing or intentional possession or distribution of a listed chemical, "knowing, or having reasonable cause to believe," that the listed chemical will be used to unlawfully manufacture a controlled substance.

2. Whether the government must prove as an element of the offense under 21 U.S.C. 841(c)(2) that the listed chemical possessed or distributed by a defendant was in fact actually used in the subsequent manufacture of a controlled substance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 428 F.3d 823.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2005 (Pet. App. 30). A petition for rehearing was denied on October 14, 2005 (Pet. App. 15). An amended judgment of the court of appeals was entered on November 9, 2005. The petition for a writ of certiorari was filed on February 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner

was convicted on two counts of distributing, and on one count of possessing, a listed chemical, pseudoephedrine, knowing or having reasonable cause to believe that the chemical would be used to manufacture a controlled substance, methamphetamine, in violation of 21 U.S.C. 841(c)(2). Gov't C.A. Br. 4, 6. The district court sentenced petitioner to 70 months of imprisonment. Pet. App. 33. The court of appeals affirmed petitioner's convictions, but remanded for reconsideration of his sentence. *Id.* at 1-14.

1. Petitioner operated a grocery business in Spokane, Washington, called "J & K Gas & Grocery." Beginning in the winter of 2001, the Drug Enforcement Agency began surveillance of petitioner's grocery store and a number of other convenience stores in the area. The DEA suspected that the store owners were selling excessive quantities of pseudoephedrine to individuals who then used the ingredient to make methamphetamine. Pet. App. 3.

Pseudoephedrine is a chemical ingredient in a number of cold medicines that can be purchased over-the-counter without a prescription. Pseudoephedrine may be extracted from cold pills and mixed with other chemicals, however, to manufacture methamphetamine. Certain brands of pseudoephedrine pills, including the "Action" brand, facilitate the process of extraction because they do not have a coating. Petitioner stocked Action brand pseudoephedrine behind the counter and in the back room of his store. Pet. App. 3-4.

Petitioner's convictions arose from a series of transactions in which he sold large amounts of Action cold pills. Pet. App. 4. On March 7, 2002, petitioner sold 61 boxes of Action to an informant and an undercover DEA task force officer in a series of purchases. *Ibid.* During

the afternoon on that day, the two first purchased a total of 21 boxes of Action, three at a time on seven separate trips to the store. Gov't C.A. Br. 8-10. The two then advised petitioner that they wanted to purchase a case (144 boxes) of Action in order to "cook" "crystal," a shorthand reference to crystal methamphetamine. Petitioner told the two to return to the store later that evening. They returned after the store closed, and petitioner sold the informant 40 more boxes of Action. Pet. App. 4; Gov't C.A. Br. 10.

On March 13, 2002, a second DEA informant made a controlled purchase from petitioner of a case of Action for $1500. A week earlier, DEA agents had pulled the informant over in his car after he had purchased a case of matches from petitioner's store. The matches had red phosphorous tips, which are also used in methamphetamine production. The informant agreed to cooperate in the investigation after DEA agents found methamphetamine and ingredients used to make methamphetamine inside his car. During the March 13th purchase, after the informant had paid for the case of Action, petitioner had him wait while another store employee put the pills in a "Mike's Hard Lemonade" box and further concealed the pills by putting ice on top of the boxes of Action. Petitioner also asked the informant at that time if he wanted to buy more matches. Pet. App. 4-5.

Earlier that same evening, a third party not working with the DEA bought $950 worth of Action from petitioner's store that he had ordered in advance. DEA agents arrested the third party purchaser as he was driving away from the store. Pet. App. 4-5. The third party had previously made purchases of Action from petitioner on about seven occasions in amounts that varied from 10 to 180 boxes. Gov't C.A. Br. 12. The third

party stated that petitioner usually placed the Action in a brown paper bag and then placed bananas on top of the pseudoephedrine pills, even though he had not purchased bananas. *Id.* at 12-13.

A search of petitioner's store in August 2002 resulted in the discovery of a stack of more than 50 invoices showing frequent, large-quantity orders of Action from two different suppliers. Gov't C.A. Br. 13-14.

2. Petitioner was indicted on two counts of distribution and one count of possession of a listed chemical, pseudoephedrine, knowing or having reasonable cause to believe that it would be used to manufacture a controlled substance, methamphetamine, in violation of 21 U.S.C. 841(c)(2). Gov't C.A. Br. 4. Section 841(c)(2) punishes "[a]ny person who knowingly or intentionally * * * possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter."[1] Pseudoephedrine is a listed chemical. See 21 U.S.C. 802(34)(K). Following a jury trial, petitioner was convicted on all three counts of the indictment and sentenced to 70 months of imprisonment. Gov't C.A. Br. 6; Pet. App. 33.

3. The court of appeals affirmed, but remanded for reconsideration of his sentence. Pet. App. 1-14.

a. The court of appeals disagreed with petitioner's contention that, because 21 U.S.C. 841(c)(2) permits conviction if the defendant has "reasonable cause to be-

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[1] Before a redesignation in 2000, the current language of 21 U.S.C. 841(c)(2) was set out in 21 U.S.C. 841(d)(2) (1994). See *United States* v. *Sdoulam*, 398 F.3d 981, 988 n.5 (8th Cir. 2005). Where appropriate, references in this brief to Section 841(c)(2) include the former Section 841(d)(2).

lieve" the listed chemical will be used to manufacture a controlled substance, it criminalizes conduct without imposing a *mens rea* requirement. The court held that "reasonable cause to believe," in the context of Section 841(c)(2), "requires that a defendant subjectively know facts that either cause him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs." Pet. App. 7.[2] That interpretation of the statute, the court of appeals held, limits the likelihood of a defendant being prosecuted for "mere inadvertent conduct" and is consistent with the long-standing principle presuming a *mens rea* requirement for criminal activity. *Ibid.* The court noted that since the text of Section 841(c)(2) "already limits criminal punishment to those who acted 'knowing or having reasonable cause to believe' that illegal activity was afoot," the statute was unlike the provision addressed in *Staples* v. *United States*, 511 U.S. 600, 605 (1994), which did not specify a *mens rea* requirement at all. Pet. App. 7-8 n.1.

The court of appeals also rejected petitioner's argument that the "reasonable cause to believe" standard requires proving actual knowledge of the purchaser's intended illegal use of the pills. Such a reading would be redundant, the court held, because Section 841(c)(2) already provides for conviction based on a defendant's actual knowledge of the intended illegal use. The court further observed:

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[2] The court of appeals thus approved the district court's jury instruction that defined "reasonable cause to believe" in Section 841(c)(2) as "to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance." Pet. App. 7.

> [R]easonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant in a particular case*—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs.

Pet. App. 8. Because the determination whether a defendant had "reasonable cause to believe" turns on the particular facts known to the defendant, the court of appeals concluded that, as a practical matter, "the differences between actual and constructive 'knowledge' under the statute are not substantial." *Ibid.*

Turning to an examination of the evidence presented against petitioner at trial, the court of appeals concluded that the evidence was sufficient to show that he had the requisite criminal intent to violate the statute. Petitioner was aware of the sales of Action in bulk quantities to repeat purchasers, and the purchasers in this case specifically told him that they were going to make "crystal." Further, petitioner's own behavior, such as his concealment of the pseudoephedrine packages he sold, was strong circumstantial evidence that he knew he was selling Action for an illicit use, "not to cure runny noses." Pet. App. 9.

b. The court of appeals also rejected petitioner's claim that Section 841(c)(2) requires actual production of methamphetamine as an element of the offense. Pet. App. 9-10. Because the crime is committed at the moment a defendant possesses or distributes a listed chemical while knowing or having reasonable cause to believe the chemical will be used to make drugs, the court of appeals explained, "a defendant violates the statute based on his understanding that he or she is contribut-

ing to the production of illicit drugs, even if the drugs ultimately are not made." *Id.* at 10.

c. In the court of appeals petitioner also unsuccessfully claimed that the jury instructions failed to ensure a unanimous verdict on one count, and that the sentencing judge erred in calculating his Guidelines sentencing range. See Pet. App. 10-14. Petitioner does not renew those claims here. Because petitioner had been sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), the court of appeals remanded the case to the district court for reconsideration of petitioner's sentence with the Guidelines treated as advisory, in accordance with its decision in *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

ARGUMENT

1. The petition does not warrant this Court's review for the threshold reason that the Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The court of appeals remanded this case for reconsideration of petitioner's sentence. The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). The denial of certiorari at this time does not preclude petitioner from raising the same issues in a later petition, after the entry of final judgment. This Court routinely denies petitions by criminal defendants challenging interlocutory determinations

that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if the defendant's conviction and sentence ultimately are affirmed on appeal, all of the defendant's claims—or at least those that the defendant concludes are most meritorious—will be consolidated and presented in a single petition to this Court. See *ibid.*

2. Petitioner contends (Pet. 11-24) that the district court erred in instructing the jury on the intent required for conviction under 21 U.S.C. 841(c)(2). He argues that the instruction approved by the court of appeals removes any *mens rea* requirement in Section 841(c)(2) prosecutions, and he contends that the Constitution in most cases prohibits conviction for a criminal offense without a showing of *mens rea*. The court of appeals correctly rejected petitioner's argument that the challenged instruction eliminates any *mens rea* element, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

a. Section 841(c)(2) punishes persons who knowingly or intentionally possess or distribute a listed chemical, such as pseudoephedrine, "knowing, or having reasonable cause to believe," that the listed chemical will be used to unlawfully manufacture a controlled substance. 21 U.S.C. 841(c)(2). The jury instruction at petitioner's trial defined having "reasonable cause to believe" as "to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the

pseudoephedrine would be used to manufacture a controlled substance." Pet. App. 7.

Contrary to petitioner's argument, the instruction describing the meaning of "reasonable cause to believe" does not eliminate the criminal intent requirement from the statute. Rather, the challenged instruction describes an intent requirement that, as the court of appeals observed, "incorporates both subjective and objective considerations to ensure the defendant had a sufficiently 'guilty mind' in violating the statute." Pet. App. 2-3, 7. The district court's instruction did not permit a conviction for mere negligence in ascertaining the facts. See *United States* v. *Green*, 779 F.2d 1313, 1318 (7th Cir. 1985) ("reasonable cause to believe" provision in the statute "does not criminalize a negligent or reckless act"). Rather, in accord with the language of Section 841(c)(2), the instruction required the government to prove that petitioner subjectively knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. As the court below correctly noted, that "standard [of proof] limits the likelihood that a defendant will be prosecuted for mere inadvertent conduct and is consistent with the longstanding principle presuming a mens rea requirement for criminal activity." Pet. App. 7.

b. Because the instructions at petitioner's trial did not eliminate the criminal intent required for conviction under Section 841(c)(2), petitioner's reliance on decisions of this Court that have either imputed a knowledge requirement where a statute was silent as to the requi-

site intent,[3] or construed ambiguous language in a statute to apply a knowledge requirement to particular elements of an offense,[4] do not apply. Here, the court of appeals concluded that there is no need to read a mental state requirement into Section 841(c)(2) because "it already limits criminal punishment to those who acted 'knowing or having reasonable cause to believe' that illegal activity was afoot." Pet. App. 7-8 n.1. Moreover, petitioner's opposing view, which would require the government to prove that the defendant had actual subjective knowledge that the chemical was to be used to unlawfully manufacture controlled substances fails to take into account the "reasonable cause to believe" language in the statute. See *id.* at 8 ("Such a reading would be redundant because the statute already provides for conviction based on a defendant's actual knowledge of the intended illegal use."); see also *United States* v. *Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) ("[T]he statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge.").

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[3] For example, petitioner cites (Pet. 24) *Staples* v. *United States*, 511 U.S. 600, 605 (1994), where the Court read a criminal intent requirement into a firearms statute that was otherwise silent on the required *mens rea*. Unlike the firearms statute in *Staples*, the text of Section 841(c)(2) specifies the intent requirement—*i.e.*, that the defendant know, or have reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance.

[4] Petitioner cites (Pet. 21-23) *Liparota* v. *United States*, 471 U.S. 419 (1971) and *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994). The statutes in those cases included the term "knowingly," and the cited decisions addressed whether that intent requirement applied to certain offense elements. That type of interpretive question is not presented by the language of Section 841(c)(2).

d. Petitioner contends (Pet. 11-14) that the decision below conflicts with Tenth Circuit decisions on the proof of intent required for conviction under Section 841(c)(2), but it is not clear that any substantive difference exists.

In *United States* v. *Saffo*, 227 F.3d 1260, 1268-1269 (2000), cert. denied, 532 U.S. 974 (2001), the Tenth Circuit held that a defendant may be convicted under Section 841(c)(2) if he had "reasonable cause to believe" that the listed chemical would be used to manufacture a controlled substance, and it rejected the argument that such a *mens rea* requirement is constitutionally insufficient. The court in *Saffo* stated that the statute's *mens rea* requirement looks to "whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance"—a standard that "requires scienter to be evaluated through the lens of this particular defendant, rather than from the p[er]spective of a hypothetical reasonable man." *Id.* at 1268-1269; accord *United States* v. *Muessig*, 427 F.3d 856, 862 (10th Cir. 2005) (upholding conviction where "[a] reasonable jury could infer from [the defendant's] conduct and admissions that she had reasonable cause to believe the pseudoephedrine would be used to make controlled substances"). That position is consistent with the standard approved by the court below, which cited *Saffo* with approval and stated that "reasonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant* in a particular case—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs." Pet. App. 8.

Petitioner argues (Pet. 12, 14) that the decision in this case conflicts with the Tenth Circuit's later decision in *United States* v. *Truong*, 425 F.3d 1282 (2005). *Truong* did not address a challenge to jury instructions, as in this case, but instead addressed a claim that the evidence was insufficient to prove that the defendant violated Section 841(c)(2). The Tenth Circuit in *Truong* stated that the Ninth Circuit had adopted an "objective" standard, under which the government need only prove "that a reasonable person in the defendant's circumstances should have known * * * that the substance would be used to manufacture methamphetamine," and the court appeared to draw a contrast between that standard and its own, more "subjective" standard. 425 F.3d at 1289. As the decision in the instant case makes clear, however, the Ninth Circuit has not adopted an entirely objective standard. Instead, the Ninth Circuit requires proof that the defendant *subjectively* knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. Pet. App. 8. That standard is quite similar to the Tenth Circuit's standard in *Saffo* and in *Truong* itself.[5] The Tenth Circuit's comment that the "reasonable cause to believe" standard under Section 841(c)(2) is "akin to actual knowledge," *Truong*, 425 F.3d at 1289 (quoting *Saffo*, 227 F.3d at 1269), is also

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[5] See *Truong*, 425 F.3d at 1289 (noting that it is not sufficient "for the government to prove that the defendant was negligent or reckless with respect to the risk that the [listed chemical] would be used to manufacture methamphetamine," but that it would be sufficient for the government to prove that "the defendant was aware, *or had reasonable cause to believe*, that the substance would be used for the specific purpose of manufacturing methamphetamine") (emphasis added). Accord *Muessig*, 427 F.3d at 861-862.

consistent with the position adopted by the court of appeals in this case, which noted that, "[a]s a practical matter," the "differences between actual and constructive 'knowledge' under the statute are not substantial." Pet. App. 8.

3. Petitioner also contends (Pet. 25-27) that the government must prove as an element of the Section 841(c)(2) offense that the pseudoephedrine pills he sold were actually used to manufacture methamphetamine unlawfully. According to petitioner, since the pseudoephedrine pills he sold to informants and a law enforcement officer in the "sting" investigation were not in fact used to unlawfully make methamphetamine, his convictions must be reversed. The court of appeals correctly rejected that claim.

As the court of appeals explained, the Section 841(c)(2) offense is committed at the moment a defendant possesses or distributes a listed ingredient while knowing or having reasonable cause to believe the chemical will be used to unlawfully make drugs. Pet. App. 10. Accordingly, "a defendant violates the statute based on his understanding that he or she is contributing to the production of illicit drugs, even if the drugs ultimately are not made." *Ibid.*

That understanding is consistent with the ordinary meaning of the terms involved. Section 841(c)(2) does not contain two independent requirements—the existence of a reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance *and* actual use of the chemical to do so. Rather, Section 841(c)(2) contains the single requirement that the defendant have reasonable cause to believe that the listed chemical will be so used. Just as, for example, a person may have a reasonable cause to believe that her

husband will be going to the supermarket if various facts (such as the husband's statement, the time of day, his possession of a grocery list, etc.) indicate that destination, a defendant may have a reasonable cause to believe that a listed chemical will be used to manufacture methamphetamine based on various circumstances known to the defendant. The fact that the spouse does not in fact go to the supermarket, or that the listed chemical is not in fact used to manufacture a controlled substance, does not negate the conclusion that there was reasonable cause to believe that those events would occur.

The only appellate courts that have addressed the issue have agreed with the court below that the language of Section 841(c)(2) does not require proof that controlled substances were actually manufactured from chemicals possessed or sold by a defendant. See *United States* v. *Prather*, 205 F.3d 1265, 1269 (11th Cir.) (plain language of the statute indicates that "Congress did not intend to require proof that the controlled substance had actually been manufactured"), cert. denied, 531 U.S. 879 (2000); *United States* v. *Benbrook*, 40 F.3d 88, 94 (5th Cir. 1994) ("statute does not require the possessor to be either in the process of manufacturing the drug or presently able to do so to be guilty of this charge"); *Green*, 779 F.2d at 1319 (proof of the actual manufacture of drugs using the prohibited chemical is not necessary).

There is no conflict among the circuits on this issue. While petitioner cites (Pet. 26) decisions from the Fifth Circuit and the Seventh Circuit to support his claim that a conflict exists—see *United States* v. *Plyman*, 551 F.2d 965 (5th Cir. 1977), and *United States* v. *Kraase*, 484 F.2d 549 (7th Cir. 1973)—those cases construed a firearms statute containing language different from the

drug statute at issue here.[6] As the Seventh Circuit itself explained in *Green*, the firearms statute is only "superficially similar" to Section 841(c)(2), in that the firearms statute requires knowledge of or reasonable cause to believe an existing "fact" (the residency of the potential firearm purchaser) that can be verified at the time of the sale of the firearm, while Section 841(c)(2) requires knowledge or reasonable cause to believe that a future event (the use of the listed chemical to manufacture a controlled substance) will occur. *Green*, 779 F.2d at 1319. Indeed, in cases specifically addressing Section 841(c)(2), the Fifth Circuit and the Seventh Circuit, consistent with the court of appeals in this case, have directly rejected claims that the government must prove actual manufacture of controlled substances. See *Benbrook*, 40 F.3d at 94 (5th Cir.); *Green*, 779 F.2d at 1319 (7th Cir.).

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[6] *Krause* and *Plyman* involved the interpretation of language in a firearms statute barring licensees from making certain gun sales knowing, or having reasonable cause to believe, the sale was to an out-of-state resident. Based on an assessment of the legislative history and intent underlying the firearms statute, *Krause* and *Plyman* held that it did not apply where the purchase was actually made to an in-state resident, regardless of the defendant's belief to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOGA SINGH JOHAL,

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Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit
United States Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE GOVERNMENT ARGUES THAT THIS APPEAL IS NOT RIPE UNTIL RESENTENCING OCCURS, BUT THAT HAS ALREADY HAPPENED.

The government raises one issue in its brief in opposition that was not addressed in the petition; that is the question of whether this case is ripe for review. The government asserts that the judgment is not final because although the conviction was affirmed, the case was remanded for resentencing pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

We disagree that a remand for reconsideration of sentence places this case in an interlocutory posture. There is nothing further for the lower courts to decide with respect to the conviction, since that has already been affirmed; thus the policy of waiting for a final decision on the issue presented before granting review, *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring), is fully satisfied by prompt consideration of this petition. This Court has therefore granted review in this situation – where the federal issue concerning the validity of the conviction is final, even though there is a remand for resentencing – in the past. In fact, that was the precise situation in *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). In *Brady*, this Court granted the petition for writ of certiorari where the state's highest court had denied a petition for collateral relief from the conviction but had remanded for resentencing. This Court reviewed the question of law that was relevant only to the conviction.

It is not even clear that the petitioner could raise his current challenge to the conviction following resentencing. The government has argued in other cases that challenges to the conviction must be raised immediately in the first appeal, and are not timely when raised after resentencing instead, because the remand for resentencing begins an entirely new proceeding that results in another final order. *See, e.g., United States v. Pultrone*, 241 F.3d 306, 307-08 (3rd Cir. 2001) (citing 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3901, at 1 (Supp. 1990)).

In any case, the government omitted a critical fact: resentencing has already occurred. A copy of the district court's order declining to reopen its prior sentencing decision is attached as App. 1-2.

II. CONCLUSION

For all the foregoing reasons, Petitioner Joga Singh Johal respectfully requests that this Court grant his Petition for Writ of Certiorari and review the judgment of the court of appeals.

DATED: April 20, 2006

Respectfully submitted,

SHERYL GORDON MCCLOUD
Attorney for Petitioner
Joga Singh Johal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOGA SINGH JOHAL, Defendant.	No. CR-02-214-FVS ORDER **ACTION REQUIRED BY UNITED STATES MARSHALS SERVICE** (Filed Apr. 10, 2006)

THIS MATTER comes before the Court pursuant to *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005). Joga Johal is represented by Frank L. Cikutovich; the government by Joseph H. Harrington.

BACKGROUND

On August 6, 2003, a jury found Joga Johal guilty of three counts of distribution of pseudoephedrine. 21 U.S.C. § 841(c)(2). Under the Sentencing Guidelines, Mr. Johal faced a range of 151-188 months in prison. He appeared for sentencing on December 12, 2003. The Court departed downward and sentenced him to a term of 70 months imprisonment. Moreover, the Court allowed him to remain out of custody while he appealed. The Ninth Circuit affirmed his conviction, but remanded his case for further proceedings consistent with *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005). After mandate was received, the Court invited the parties to submit supplemental memoranda. They have done so.

RULING

At the time the Court sentenced Mr. Johal, the Court was convinced his case fell outside the "heartland" of § 841(c)(2) cases. Consequently, the Court departed downward and imposed a sentence which was 81 months below the bottom end of the Guideline range. Now that Mr. Johal's case has been remanded by the Ninth Circuit, the Court has carefully reviewed the record, including the materials submitted by the parties since remand. Having done so, the Court is satisfied it would not have imposed a materially different sentence on December 12, 2003, had the Court known the Sentencing Guidelines were advisory.

IT IS HEREBY ORDERED:

1. The Court declines to resentence Mr. Johal.

2. The United States Marshals Service shall furnish a copy of the judgment to the Bureau of Prisons so the Bureau can designate the facility at which Mr. Johal will serve his sentence.

3. Mr. Johal shall report to the facility designated by the Bureau of Prisons on the date and at the time specified by the Bureau.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel, to the United States Marshals Service, and to the United States Probation Office.

DATED this 10th day of April, 2006.

s/ Fred Van Sickle
Fred Van Sickle
United States District Judge